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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING 1881 AND 1882.

REPORTED BY

CHAS. F. BICKNELL,

CLERK OF SUPREME COURT,

AND

HON. THOMAS P. HAWLEY,

ASSOCIATE JUSTICE.

VOLUME XVI.

SAN FRANCISCO:

A. L. BANCROFT AND COMPANY,

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JUSTICES OF THE SUPREME COURT.

HON. ORVILLE R. LEONARD.....CHIEF JUSTICE.
HON. THOMAS P. HAWLEY..... } ASSOCIATE JUSTICES.
HON. CHARLES H. BELKNAP..... }

OFFICERS OF THE COURT.

HON. M. A. MURPHY.....ATTORNEY GENERAL.
CHAS. F. BICKNELL.....CLERK.
S. T. SWIFT.....BAILIFF.

DISTRICT JUDGES

OF THE STATE OF NEVADA.

1881.

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SECOND DISTRICT.....HON. S. D. KING.
THIRD DISTRICT.....HON. W. M. SEAWELL.
FOURTH DISTRICT.....HON. W. S. BONNIFIELD
FIFTH DISTRICT.....HON. D. C. MCKENNEY.
SIXTH DISTRICT.....HON. HENRY RIVES.
SEVENTH DISTRICT.....HON. J. H. FLACK.

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RULES

OF THE

BOARD OF PARDONS.

---

1. The regular meetings of the board shall be held on the second Monday of January, April, July, and October of each year.

2. Special meetings may be called by the Governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the law of the state, "approved February 20, 1875."

4. In every case where the applicant has been confined in the state prison, he or she must procure a written certificate of his or her conduct during such confinement, from the warden of said prison, and file the same with the secretary of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon, and the relief asked for has been refused, it shall not, within twelve months

thereafter, be again taken up or considered upon any of the grounds specified in the application under consideration, except by the consent of a majority of the members of the board; nor in any case except upon new and regular notice as required by law in case of original application.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney General.

Second. The Junior Associate Justice of the Supreme Court.

Third. The Senior Associate Justice.

Fourth. The Chief Justice.

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon, or restoration of citizenship.

9. No document relating to a pending application for pardon or commutation of sentence, or to a prior application which has been denied, shall be withdrawn from the custody of the clerk after filing, unless by consent of the board.

10. Applications for pardon or commutation of sentence must be filed with the clerk at least two days before the regular meeting of the board, at which the application is to be considered.

RULES

OF

THE SUPREME COURT

OF THE STATE OF NEVADA.

RULE I.

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. The supreme court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this state and of the United States;

2. The constitutional relations of the state and federal governments;

3. The jurisdiction of the various courts of this state and of the United States;

4. The various sources of our municipal law;

5. The general principles of the common law relating to property and personal rights and obligations;

6. The general grounds of equity jurisdiction and principles of equity jurisprudence;

7. Rules and principles of pleadings and evidence;

8. Practice under the civil and criminal codes of Nevada;

9. Remedies in hypothetical cases;

10. The course and duration of the applicant's studies.

3. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so, fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

4. When the examination is completed and reduced to writing, the examiners will return it to this court, accompanied by their certificate showing whether or not the applicant is of good moral character and has attained his majority, and is a *bona fide* resident of this State; such certificate shall also contain the facts that the applicant was examined in the presence of the committee; that he had no knowledge or intimation of the nature of any of the questions to be propounded to him before the same were asked by the committee, and that the answers to each and all the questions were taken down as given by the applicant without reference to any books or other outside aid.

5. The fee for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) thirty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

1. If the transcript of the record be not filed within the time prescribed by Rule II., the appeal may be dismissed

on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

2. On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request that he has not paid the fees therefor, if the same have been demanded.

RULE IV.

1. All transcripts of record in civil cases shall be printed on unruled white writing-paper ten inches long by seven inches wide, with a margin, on the outer edge, of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica solid is the smallest letter and most compact mode of composition allowed.

2. Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only of transcript paper, sixteen inches long by ten and one half inches in width, with a margin of not less than one and one half inches wide, fastened or bound together on the left sides of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read. The transcript, if written, shall be in a fair, legible hand, and each paper or order shall be separately inserted.

3. The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE V.

The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

RULE VI.

The expense of printing transcripts, on appeal in civil causes and pleadings, affidavits, briefs, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be

accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

1. The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; provided, that all civil cases in which the appeal is perfected, and the statement settled, as provided in Rule II., and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon at any time, on motion of the defendant.

3. Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

RULE XI.

1. At least six days before the argument, the appellant shall furnish to the respondent a printed copy of his points

and authorities, and within two days thereafter the respondent shall furnish to the appellant a written or printed copy of his points and authorities.

2. On or before the calling of the cause for argument each party shall file with the clerk his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made.

3. The oral argument may, in the discretion of the court, be limited to the printed points and authorities filed, and a failure by either party to file points and authorities under the provisions of this rule, shall be deemed a waiver by such party of the right to orally argue the cause.

4. No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below, may be heard through his own counsel.

5. At the argument, the court may order printed briefs to be filed by counsel for the respective parties within such time as may then be fixed.

6. In criminal cases it is left optional with counsel either to file written or printed points and authorities or briefs.

RULE XII.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE XIII.

Besides the original, there shall be filed ten copies of the transcript, briefs, and points, and authorities, which copies shall be distributed by the clerk.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, and presented within ten days after the final judg-

ment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein provided, and decisions upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court-room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *supersedeas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

RULE XXIV.

In all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by an order of one of the justices, the notice shall be five days.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

JANUARY TERM, 1881.

[No. 1,034.]

THADDEUS B. ROYCE, APPELLANT, *v.* J. C. HAMPTON, ADM'R, ETC., ET AL., RESPONDENTS.

EQUITABLE RELIEF—NEGLIGENCE.—Courts of equity will not grant relief to a party who has had an opportunity to be heard in a court of law without a showing that he was prevented from being heard by the wrongful acts of the prevailing party, unmixed with any negligence or fault on his part.

IDEM—MISREPRESENTATIONS.—Courts of equity will not grant relief to a party upon the ground of misrepresentations made to him, unless he shows that he relied and acted upon them believing them to be true.

IDEM—DECREE OF DISTRIBUTION—LACHES OF CLAIMANT—POVERTY NO EXCUSE.—Where a claimant has knowledge of the proceedings for the settlement of an estate, of the time fixed for a decree of distribution, that the estate is valuable, that his claim of relationship is denied, that the administrator failed to answer his letters, and where all the proceedings were regular and legal in form and without any fraud, concealment, or misrepresentation: *Held*, that the fact that the claimant was in delicate health and in poor circumstances is not sufficient to excuse him from making an effort to appear in the proceedings and assert his rights.

ESTATES OF DECEASED PERSONS—DUTY OF ADMINISTRATORS.—Administrators should be held to the utmost good faith and strict performance of official duty. They are, however, mere creatures of the statute, and are only bound to perform such duties as are imposed upon them by the law.

IDEM.—Where the decree of distribution is not made upon the petition of the administrator, he is not bound to notify the court that there are other parties, besides the petitioner, who claim to be heirs of the estate.

Statement of Facts.

IDEM—DUTY OF PETITIONER.—It is the duty of the petitioner for a decree of distribution to inform the court as to all heirs of the estate entitled to share in the distribution thereof; but when petitioner claims to be the sole heir of the estate, and regularly pursues the course required by the statute in giving notice, etc., he is not guilty of fraud upon the court, because he does not state the names of other parties who claim to be heirs of the estate.

SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.—The evidence reviewed and held to be sufficient to support the findings that plaintiff "was guilty of negligence and laches which are unexcused."

APPEAL from the District Court of the First Judicial District, Storey County.

The findings referred to in the opinion of the court are as follows:

19. "That for upwards of five months before the said decree of distribution was made, plaintiff suspected that said William John Ford and defendant (J. C. Hampton) intended to cheat him (plaintiff) out of the estate of said Oliva Rosanna Ford, and knew that said William John Ford claimed that plaintiff was no relation to him (Ford)."

20. "That said plaintiff knew, before the nineteenth day of October, 1875, that said estate of said Oliva Rosanna Ford was in process of settlement and distribution, and was about to be distributed in said district court, but never appeared, or offered to appear, or made any effort to appear, either in person or otherwise, in said estate proceedings, or any of them, in said district court."

22. "That plaintiff was not prevented from taking, and did not fail to take, steps to appear in said district court, in said estate matter and proceedings, by reason of any representations whatever, by letter or otherwise, of said J. C. Hampton, defendant herein, as administrator or otherwise, or said William John Ford; and plaintiff did not appear, or take steps to appear, in said estate proceedings, in said district court, by reason of any concealment practiced by said J. C. Hampton or said William John Ford, touching the value of the estate of said Oliva Rosanna Ford, or of any of the proceedings therein in said district court."

26. "That plaintiff knew it to be his duty to be repre-

sented by counsel or to appear in person in said estate proceedings in said district court, and has failed to excuse his negligence for not appearing, or being represented therein."

27. "That plaintiff did not rely or act upon any of the representations concerning the value of the estate of said Oliva Rosanna Ford made to him by said William John Ford or J. C. Hampton, as administrator, or otherwise."

Lewis & Deal, and J. H. Graham, for Appellant:

I. The scope of inquiry by courts of chancery as to what constitutes fraud is much broader than that of courts of law, nor are they hampered by the inflexible rules which circumscribe the investigations of the latter. Any element of unfair dealing, any unconscionable advantage obtained, any deception practiced, any concealment of a fact which should in good conscience be revealed, the mental and other conditions of the parties, the relationship of the parties to each other, are all matters which will be considered by a court of chancery in determining whether fraud has been committed. (Kerr on Fraud and Mistake, 43, 44; Freeman on Judgments, sec. 486; *Reigal* v. *Wood*, 1 Johns. Ch. 402; 2 J. J. Marsh. 405; 17 Barb. 202; 1 Story's Eq. Jur., secs. 119, 122, 133, 140, 146, 147, 222, 234, 323, 439; 9 Pick. 113–125; 2 Perry on Trusts, sec. 924; 1 Stock. 246; 5 Ire. Eq. 123; 7 Eng. Ch. 200; 15 Id. 331–332; Lewin on Trusts, 330, 331; 6 Miss. 365; 6 J. J. Marsh. 258.)

II. There is nothing in our constitution or laws making the probate jurisdiction exclusive. When such is not the case, courts of equity have always interfered when fraud has been perpetrated or undue advantage has been taken. (*Clarke* v. *Perry*, 5 Cal. 59; *Wilson* v. *Roach*, 4 Id. 362; *Deck* v. *Gerke*, 12 Id. 433; *Griggs* v. *Clark*, 23 Id. 429; *Wright* v. *Miller*, 1 Sanf. Ch. 103–119; 1 Story's Eq. Jur., sec. 531–543; also 184, n.)

III. Under the authorities, the facts of this case clearly constitute such a fraud as will justify setting aside the decree. (*Hoitt* v. *Holcom*, 23 N. H. 535; 4 J. J. Marsh. 491; 13 N. J. L. 26; Smith's Manual, 60; *Heyden* v. *Heyden*, 46 Cal. 340; 3 Green's (N. J.) Eq. 465.) That mere conceal-

ment of a material fact, which it is the duty of a party to make known, constitutes fraud, is borne out by all the authorities. (Smith's Manual, 61; *Belden* v. *Henriques*, 8 Cal. 87; 1 Perry on Trusts, 178; 2 Id. 924; Lewin on Trusts, 336; Willard on Ex. 406.)

IV. The probate act makes it the duty of the executor and administrator to make known to the court all persons claiming to be heirs. (1 Comp. L. 485, 538, 637, 742, 496, 542, 638, 639, 655.) The court is required to appoint an attorney to represent and guard the rights of absent heirs. (1 Comp. L. 641, 644, 717, 740, 742.)

V. In an ordinary action at law the parties must appear and protect their own interests, or they will be chargeable with default. But in probate proceedings it is made the duty of executors and administrators, and also of the court, to protect the rights of all parties claiming an interest in the estate of deceased persons. Nothing can be taken by default; and when absent heirs do not appear it is the bounden duty of the court to appoint an attorney to represent their interests. (Willard on Ex. 406; *Wright* v. *Miller*, 1 Sanf. Ch. 119; *Carneal* v. *Wilson*, 3 Litt. (Ky.) 80, 90, 91; 33 N. Y. 25.)

VI. Royce was not guilty of any laches. The probate act nowhere requires an heir to appear, but on the contrary has made all provisions for the protection of his rights without such appearance. If it was the intention of the legislature to bar all rights when the persons claiming them failed to appear in court under the published notices, why should it have made provision for the protection of the rights of such persons in cases where there is no appearance by them by the giving of special notice, the appointing of an attorney for them, and the requirement that the administrator shall notify the court who the heirs are? It is perfectly manifest that the legislature contemplated the protection of the rights of all persons, whether they appear or not. In this case had Hampton and Ford not been guilty of fraud by concealing Royce's claim from the court, his rights would have been as fully guarded as if he had appeared in person. Unless it can be said that the plaintiff

knew that the administrator was disregarding his duty under the law—that he was committing a fraud on the court—there was no reason why he should make any appearance, because he had the right to believe that his rights would be as well protected in his absence as they would if he appeared in court. Hampton's letter of November, 1875, was calculated to make Royce believe that there was not sufficient property left after the fire to justify him in incurring the expense of an appearance in court, and that of itself should justify the setting aside of a decree. (*Hayden* v. *Hayden*, 46 Cal. 340.) Courts of equity take into consideration the condition of the party, his indigence, bodily and mental condition.

C. H. Belknap, for Respondents:

I. When a party has once an opportunity of being heard and neglects to do so, he must abide the consequences of his neglect. A court of equity can not relieve him though the judgment is manifestly wrong. It is a general rule that parties are to be held to the exercise of caution and diligence in the management of their lawsuits, and are not to be allowed a double opportunity of presenting their defenses. A complainant in equity seeking to avoid the effect of a judgment against him at law, must, therefore, always disclose a sufficient excuse for not making his defense in the original action. (Freeman on Judgments, secs. 485, 486, 502; Story Eq. Jur., sec. 1574; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332; *Foster* v. *Wood*, 6 Johns. Ch. 89; *Lansing* v. *Eddy*, 1 Id. 50; *Dobson* v. *Pierce*, 12 N. Y. 165; *Stillwell* v. *Carpenter*, 59 Id. 423; *Smith* v. *Nelson*, 62 Id. 287.)

II. The probate acts of California and of this state are similar, and require that an order of distribution shall be obtained in the same manner as an order for the sale of real estate. (*Boyd* v. *Blankman*, 29 Cal. 19.)

III. The order of distribution was conclusive as to the rights of the parties. (*Loring* v. *Steineman*, 1 Met. 207; *Bates* v. *Ryberg*, 40 Cal. 465; *Estate of Stephen A. Wright*, 49 Id. 550; *Estate of Alfred G. Pritchett*, 51 Id. 568.)

IV. Courts of equity will not relieve parties to whom misrepresentations have been made unless such misrepresentations have been relied upon. (Story's Eq. Jur., 11th ed., secs. 191–200 (a); *Whiting* v. *Hill*, 23 Mich. 405; *Bowman* v. *Carithers*, 40 Ind. 90.)

By the Court, HAWLEY, J.:

The plaintiff, Royce, a brother of Oliva Rosanna Ford, deceased, seeks to set aside a decree of distribution of his sister's estate, made by the district court of Storey county, on the third day of October, 1876, upon the ground of fraud, concealment, and misrepresentation upon the part of J. C. Hampton, who was administrator of her estate, and of William John Ford, her husband, who was by said decree declared to be the sole heir at law of said estate. All of the proceedings in the settlement of the estate were regular and legal in form. The court, before which this cause was tried without a jury, found that there was no fraud, concealment, or misrepresentation upon the part of the administrator, or of the husband of the deceased, and that plaintiff, by not appearing in the proceedings of said estate, "was guilty of negligence and laches which are unexcused." Appellant claims that these findings are not sustained by the evidence.

It is a cardinal principle that courts of equity will not grant relief to a party who has had an opportunity of being heard in a court of law without a showing that he was prevented from doing so by the wrongful acts of the prevailing party, unmixed with any negligence or fault on his part. The general rule is thus stated by Freeman in his work on judgments: "To entitle a party to relief from a judgment or decree, it must be made evident that he had a defense upon the merits; and that such defense has been lost to him, without such loss being '*attributable to his own omission, neglect, or default.*' The loss of a defense, to justify a court of equity in removing a judgment, must, in all cases, be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any fault of himself or his agent." (Sec. 486.)

1. Does the evidence show that plaintiff was guilty of

negligence and laches which are unexcused? It appears that Mrs. Ford died intestate on the eleventh day of June, 1875; that on the twelfth of July following, J. C. Hampton was appointed administrator of her estate; that plaintiff was advised of these facts shortly after they occurred, and was notified that the estate was worth seventy-five thousand dollars; that the plaintiff, thereafter, wrote four letters to the administrator, dated, respectively, October 19, 1875, November 20, 1875, February 20, 1876, and April 9, 1876, which were received by due course of mail within about one week after they were written, making inquiries about the estate and proceedings therein, and representing himself to be a brother of the deceased; that on the twenty-third of February, 1876, one G. T. Dennis, at the request of plaintiff, addressed a letter to Mr. Hampton; that Hampton answered the first letter written by plaintiff, and the letter written by Dennis, and made no reply to the other letters; that on the fourteenth of July, 1875, Mr. Ford, in answer to a letter received from plaintiff's wife, addressed a letter to the plaintiff and, among other things, said: "Now, Thaddeus, concerning our property, it is in the hands of an administrator. We owe somewhat in the neighborhood of twelve thousand dollars, with two per cent. interest per month, but I think that at the expiration of a year from date everything will be easy with good management, and the debts mostly paid. Rose always wanted to look out for your boys, and God knows that as I loved her, and hope for his love, I will carry out her wishes to the best of my ability. But at the present time nothing can be done until after the time allowed for the administration of the estate by our district court, and things are at present in a muddle on account of not keeping books, which, if they had been kept, would not have been a pressure on her brain while living, nor have given vultures a chance to prey on our estate after her death."

Conceding, for the purposes of this opinion, that the letters written by Hampton, and Ford's letter of July 14, were calculated to mislead the plaintiff and conceal from him the true condition of the estate and of the proceedings had

therein, it becomes necessary to determine whether, as a matter of fact, the plaintiff relied upon these representations. His testimony shows that he did not. Speaking of the value of his sister's estate he says: "I heard from Mrs. Terrill that she was worth about seventy-five thousand dollars;" this was "before her death and after her death." In reply to the question of defendants' counsel, "Did you ever learn anything to the contrary?" he answered: "I did not." If he was mistaken in giving this testimony and had the right to believe from Hampton's letter that his sister's property after the fire of October, 1875, was "a pile of smoldering ruins," still it affirmatively appears that he did not rely upon the letter he received from Hampton, and that he was not misled by the letter of Ford. He admits that he received letters from Mr. Ford after the letter of July 14, stating in substance that he (Ford) did not recognize any relationship between himself and the plaintiff, and requested plaintiff not to call him brother; and that from these letters and from the failure of Hampton to reply to his letters he suspected something was wrong. He says: "I supposed, of course, they were endeavoring in some way to beat me out of the estate my sister intended me to have."

A court of equity will not relieve a party upon the ground of misrepresentations made to him, unless he shows that he relied and acted upon them believing them to be true. Now, with knowledge upon his part, several months before the decree of distribution was made, that the estate was valuable; that Mr. Ford did not recognize any relationship; that Mr. Hampton failed to answer his letters, and that the estate was in process of settlement and distribution, what efforts did the plaintiff make to have his rights protected? He resided in the state of Pennsylvania, and was a farmer by occupation. He applied to two or three of his friends in that state to assist him. It does not appear that either he, or they, took any steps to make an appearance in the court where the proceedings were pending; that he, or they, ever communicated with any lawyer in this state to ascertain whether or not any arrangements could be made to have his claim presented to the court, and to have his legal rights then and there heard and determined.

The only excuse which he offers is that he was "in rather poor circumstances and in poor health;" that he was "scant of money and hard to get along; that he had no means to go to Virginia City * * * or to send some one there." It is not shown that plaintiff's mental faculties were impaired, as claimed by his counsel. His deposition is quite lengthy, and, although there are discrepancies in some material portions of it, he seems to have remembered dates and events, and to have given his testimony in an ordinarily intelligent manner. The only testimony, in addition to his own, upon this point, is "that Royce was a person of delicate health, and subject to frequent and violent epileptic fits; and that said Royce was a man in poor and needy circumstances; and was such in the year 1874, and ever since has been poor and in delicate health."

These facts, however important they might have been in determining this case upon its merits, had the plaintiff shown that he had relied upon the representations of Hampton and Ford, and had thereby been misled to his prejudice, are not sufficient to excuse him, upon his knowledge of the condition of affairs, as before stated, from making an effort to appear in the proceedings in the district court. He could, notwithstanding his poverty and ill-health, have written letters and ascertained the names of prominent and reliable attorneys residing in Virginia City. He could have communicated with the attorneys, setting forth the facts, and could, doubtless, have secured their services upon reasonable terms. His financial circumstances and poor health are not shown to have been in any better condition after the decree of distribution than before, and he is now represented by able counsel. It is, therefore, fair to presume that he could have procured counsel as well before as after the settlement of his sister's estate if he had made an effort to do so.

The law aids those who are vigilant, and not those who sleep upon or slumber over their rights. Courts "can not obliterate the recognized rules of law, requiring of all persons the diligence and attention demanded of a prudent man in the transaction of his own business, and establish a

measure of care and diligence for each particular case." (*Boyd* v. *Blankman*, 29 Cal. 43.)

The facts found by the court in its nineteenth, twentieth, twenty-second, twenty-sixth, twenty-seventh, and twenty-eighth findings, relative to the negligence of plaintiff, are, in our opinion, fully sustained by the evidence.

2. Counsel for appellant argue that notwithstanding this negligence upon the part of their client the decree should be set aside because Hampton, as administrator, and Ford, the husband, committed a fraud upon the court in concealing from it the fact that plaintiff *claimed* to be a brother of the deceased. The record shows that Hampton, soon after his appointment as administrator, was made aware of the fact that plaintiff claimed to be a brother of Mrs. Ford, deceased; that he was about the same time notified by Mr. Ford that plaintiff was a bastard, and was not entitled to any share of the estate. These facts he communicated to Messrs. Mesick and Seely, attorneys for the estate. He seems to have acted in good faith in administering upon the estate. The evidence "shows that in all of said estate proceedings he acted entirely under the advice of the said attorneys."

Upon the trial of this cause it was expressly admitted by counsel for plaintiff "that no actual fraud, concealment, or misrepresentation had been in any wise intended by defendant, J. C. Hampton, in the estate proceedings of said Oliva Rosanna Ford in said district court, either upon said court or plaintiff."

The only question, therefore, which presents itself upon this branch of the case, is whether or not it was the official duty of the administrator to notify the court that Royce had written letters to him claiming to be an heir of the estate? Administrators should be held to the utmost good faith and strict performance of official duty. But they are mere creatures of the statute, and are only bound to perform such duties as are imposed upon them by the law. The decree of distribution in the estate of Mrs. Ford was not made upon the petition of the administrator, and we know of no provision of the law that required him, under the cir-

cumstances shown to have existed, to notify the court that Royce claimed to be an heir of the estate.

With reference to the husband of the deceased, upon whose petition the decree was made, but little need be said. If he knew that Royce was an heir of the estate, it was his duty to inform the court of this fact. But the truth is that Ford claimed to be the sole heir of the estate. He verified his petition setting forth this fact, and caused due notice thereof to be published to the world in the manner provided by the statute of this state.

It is true that the evidence shows that prior to the death of his wife, when visiting the plaintiff at his home in Pennsylvania, during the year 1874, Ford "recognized said Royce as his wife's brother and talked of him as such publicly and openly." The fourteenth finding of fact, in so far as it states that Mr. Ford "always claimed that plaintiff Royce was not the lawful brother of said Oliva Rosanna Ford," is not sustained by the evidence. But the fact is that after the death of his wife and prior to the month of November, 1875, and always thereafter, he claimed that no relationship existed. Upon the cross-examination of the plaintiff, when defendants' counsel called for the production of the letter of Mr. Ford to plaintiff, denying any relationship, "plaintiff's counsel states that the letter is lost and can not be found, * * * that a copy of that letter is not here." Thereupon defendants' counsel asked plaintiff this question: "In that letter Ford distinctly stated, did he not, *that he recognized no relationship between himself and you*, and requested you not to call him brother?" The plaintiff answered as follows: "He said something similar to that; *that was the substance of it.*"

With the exceptions already noted, and perhaps in a few other minor and unimportant particulars, the findings of fact necessary to support our conclusions are sustained by the evidence, and support the conclusions of law arrived at by the district court.

The judgment of the district court is affirmed.

By BEATTY, C. J.: I concur in the judgment.

This case was decided before BELKNAP, J., took his seat.

Statement of Facts.

[No. 1,042.]

THE STATE OF NEVADA, RESPONDENT, *v.* RALPH JOHNSON AND J. B. O'BRIEN, APPELLANTS.

CRIMINAL LAW—CREDIBILITY OF DEFENDANT'S TESTIMONY—INSTRUCTIONS. The credibility of defendant's testimony in his own behalf, is to be determined in the same manner as that of any other witness. The judge should not state to the jury his estimate of a witness, or give his opinion as to the weight to be attached to his testimony.

IDEM.—The court instructed the jury that "there is in every criminal case a greater or less temptation for a defendant to testify strongly or even falsely in his favor, and I consider that jurors should, in every instance, consider the testimony of a defendant with great caution:" *Held*, erroneous.

REASONABLE DOUBT.—In giving examples as to the term "reasonable doubt," courts should confine their instructions to the well-settled rules of law.

STATEMENT OF CO-DEFENDANT.—The statement of a witness relative to admissions made by the defendant O'Brien in relation to his and Johnson's participation in the robbery was admitted in evidence, with instructions that it could not be considered against the defendant Johnson, but could be considered in determining the defendant O'Brien's guilt or innocence: *Held*, that the jury could not have been misled upon this point.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The instruction as to reasonable doubt, referred to in the opinion, reads as follows: "You are instructed: As an example of what a 'reasonable doubt' is, such an one as entitles a defendant to be acquitted, has been described as such a doubt as controls men in deciding upon the most serious affairs of life. Were a man impressed with the advisability of, and, therefore, was about to take one of the most serious and important steps in life, but yet entertained such a doubt as to the propriety thereof, as to control and prevent his taking such steps, this would be described as a 'reasonable doubt.'"

When the witness Jones testified to the statements made by the defendant Murphy, in which Murphy spoke of Johnson as having been the man who was with him in the robbery, the court charged the witness not to use the name of Johnson, but to speak of him as "the other man." The

court subsequently gave the instruction referred to in the opinion.

Alexander Wilson, for Appellant Johnson.

John T. Baker, for Appellant O'Brien.

M. A. Murphy, Attorney General, for Respondent:

I. The court has a right to single out a particular witness, and to charge the jury as to his credibility. (*People* v. *Cronin*, 34 Cal. 204; *People* v. *Tom Jones*, 2 Wheeler Crim. Cas. 460.)

II. The definition as to "reasonable doubt," given by the court, conforms to the law. (Bishop's Crim. Proc., sec. 1052; Stark. Ev., sec. 865; 1 Greenl., sec. 2; Whart. Homicide, sec. 646; *State* v. *Nash*, 7 Iowa, 385; *State* v. *Ostrander*, 18 Id. 458; *Arnold* v. *The State*, 23 Ind. 170.)

By the Court, HAWLEY, J.:

Appellants were jointly indicted, tried, and convicted of the crime of robbery.

1. Upon the trial the court, of its own motion, instructed the jury as follows: "Under the laws of this state defendants are permitted to testify in their own behalf. The same clause of the statute which gives them the privilege, also provides that you are to be the sole judges of the degree of credit to be given to such testimony, *but under the instructions of the court*, and I therefore say to you that I see no reason why such testimony may not be true, but I, at the same time, fail to see any reason why it *must be true*, or why it should be entitled to more credit than that of other witnesses. There is in every criminal case a greater or less temptation for a defendant to testify strongly or even falsely in his favor, and I consider that jurors should, in every instance, consider the testimony of a defendant with great caution."

The entire framework of this instruction trenches upon the province of the jury. (*State* v. *Tickel*, 13 Nev. 502; *State* v. *Frazer*, 14 Id. 210.) When a defendant, in a criminal

case, offers himself as a witness in his own behalf, it is proper for the court to instruct the jury in relation to his credibility, especially if it has been assailed by counsel or is clouded by the circumstances of the case. His credibility, however, is to be determined in the same manner as that of any other witness. It is the exclusive province of the jury to determine from the evidence in the case, and from the appearance and manner of the witness, what credit, if any, is due to his testimony. In determining this question the jury have the right to consider the circumstances under which the witness gives his testimony, and the inducements and temptations which would ordinarily influence a person in his situation. (*People* v. *Cronin*, 34 Cal. 195; *State* v. *Hymer*, 15 Nev. 49.)

But the instructions should only inform the jurors as to what matters it would be proper for them to consider in determining the credibility of the witness. Beyond this the judge has no right to go. He should not state to the jury his estimate of the witness, or give his opinion as to the weight to be attached to his testimony. He should declare the law. The jury should find the facts.

The latter portion of the instruction is clearly erroneous. It is not true that "there is in every criminal case a greater or less temptation for a defendant to testify * * * falsely in his favor."

If the defendant is guilty there may be a temptation to swear falsely; but whether there is such an inducement or temptation is, always, a question for the jury, and not for the court, to determine. If the defendant is innocent it will generally be to his interest to tell the truth, and there can seldom be any inducement or temptation for him to testify falsely.

For the reasons already stated, it was, also, erroneous and prejudicial to the defendants for the court to say "that jurors should in every instance consider the testimony of a defendant with great caution."

The principles we have announced are sustained by numerous authorities. (*State* v. *Larkin*, 11 Nev. 330; *Greer* v. *State*, 53 Ind. 421; *Pratt* v. *State*, 56 Id. 182; *Veatch* v.

Points decided.

State, Id. 584; *Rafferty* v. *People*, 72 Ill. 37; *Roach* v. *People*, 77 Id. 31; *People* v. *Arnold*, 40 Mich. 715; *Moses* v. *State*, 58 Ala. 118; *Hogsett* v. *State*, 40 Miss. 527.)

2. The example referred to in the third instruction of the court introduced an unnecessary, if not false, quantity in the definition of the term "reasonable doubt," and ought not to have been given. It is always safer for the court to confine its instructions to the well-settled rules of law than to indulge in unnecessary illustrations which are often liable to confuse and mislead the jury.

3. The court did not err in admitting the testimony of the witness Jones relative to the admissions made by the defendant O'Brien, *alias* Murphy, in relation to his and Johnson's participation in the robbery. The court expressly charged the jury that the statement of O'Brien, as testified to by the witness Jones, could not be considered against the defendant Johnson, in determining his guilt or innocence, but that it could be considered in determining the defendant O'Brien's guilt or innocence. The court ought to have made this statement when the testimony of Jones was admitted. But it is evident from the instructions given by the court, that the jury were not misled upon this point. (*State* v. *McLane et al.*, 15 Nev. 345.)

The judgment of the district court is reversed and the cause remanded for a new trial.

[No. 1,019.]

JAMES NESBITT ET AL., RESPONDENTS, *v.* JOHN CHISHOLM ET AL., APPELLANTS.

FINDINGS MUST BE EMBODIED IN STATEMENT.—The findings of the district court will not be considered upon appeal unless they are embodied in the statement.

STATEMENT ON MOTION FOR NEW TRIAL—WHEN NOT STATEMENT ON APPEAL.—When an appeal is taken from the judgment alone, the statement on motion for a new trial will not be considered as a statement on appeal, unless there is a stipulation to that effect.

PRESUMPTIONS IN FAVOR OF JUDGMENT.—When nothing is shown to the contrary, this court will presume that the judgment is sustained by the findings, and that the findings were justified by the evidence.

RIGHTS OF PARTIES WHO HAVE NOT APPEALED NOT CONSIDERED.—A decree in favor of persons, not parties to the suit, who have not appealed, will not be considered or reviewed by this court.

APPEAL from the District Court of the Sixth Judicial District, Lincoln County.

The facts appear in the opinion.

A. B. O'Dougherty and T. W. Healy, for Appellants.

T. W. W. Davies, for Respondents.

By the Court, LEONARD, C. J.:

The decree in this case canceled and annulled a certain deed executed by defendant W. L. McKee, as sheriff of Lincoln county, in this state, to his co-defendant, John Chisholm, conveying certain property therein described; and it was further ordered, adjudged, and decreed, that the title to said property was vested, in certain designated proportions, in defendant Chisholm, plaintiffs, and three other persons not parties to the suit. Defendants moved for a new trial; the motion was overruled, and this appeal is taken from the decree only.

What purport to be the findings of fact and conclusions of law, by the court, are contained in the transcript, but are not embodied in the statement on motion for new trial. They could not, therefore, be considered, even though, on this appeal, we could consider such statement. (5 Nev. 252.) But the statement on motion for new trial must be disregarded, because the statute does not authorize such statement to be considered as a statement on appeal from the judgment alone, unless there is a stipulation of counsel to that effect. (*Williams* v. *Rice*, 13 Id. 235.)

There being no such stipulation, it follows that there is nothing before us for review except the judgment roll. Such being the case, the only error complained of that can be noticed is that the decree is at variance with the relief sought in the complaint. It is said that the complaint merely asks the court to decree the cancellation of the deed to Chisholm, and to order and adjudge that the sheriff,

McKee, convey the property to plaintiffs, while the court distributed the same in a manner not warranted by law or the evidence or by the relief sought. Nothing appearing to the contrary, every reasonable presumption in favor of the correctness of the decree must be indulged in by this court. We must presume that it is sustained by the findings, and that the latter were justified by the evidence.

Bearing in mind the facts just stated, do the pleadings sustain the decree? Certain interests in the property were decreed to be vested in Snodgrass, Rice, and Picking, respectively, who were not parties to the suit. It certainly would have been better if the court had brought them in as parties, and in the absence of such proceeding it is certain that the portion of the decree adjudging that stated interests are vested in them is a nullity, especially so far as they are concerned.

But the complaint is ample to sustain that part of the decree annulling the deed from McKee to Chisholm, as well as the portion adjudging the interests to which plaintiffs and Chisholm were entitled. And presuming that the proportions awarded to them are correct, and that the defendant Chisholm received his full share according to the evidence, he can not complain because the court adjudged that other parties were entitled to the balance, even though the latter are not so entitled. (*Dick* v. *Caldwell*, 14 Nev. 169.)

But there is a final answer to the alleged error of the court in determining the proportions belonging to the three persons not parties to the suit, which is, that no appeal is taken therefrom. Defendants only appealed "from the decree * * * *in favor of the plaintiffs* in said action, and against said defendants, and from the whole thereof." The only portions of the decree in favor of plaintiffs are those annulling the sheriff's deed, and adjudging the title of a certain portion of the property to be vested in plaintiffs.

As to the portions of the decree in favor of persons not parties to the suit, no appeal could have been taken; but

were it otherwise, there is no appeal in this case, as to them, because they were never served with notice of appeal, or otherwise treated as respondents.

The decree appealed from, so far as it affects the parties to the suit, is affirmed.

[No. 1,039.]

THE STATE OF NEVADA, RESPONDENT, *v.* ANTOINE VASQUEZ, APPELLANT.

CRIMINAL LAW—TESTIMONY OF DEFENDANT—INSTRUCTIONS.—The court instructed the jury, that in all cases the testimony of the defendant, in his own behalf, should be received "with great caution; for when one is being tried for a capital offense, the temptation to pervert or distort the facts in favor of himself is very great:" *Held*, erroneous.

VERDICT RECOMMENDING DEFENDANT TO THE MERCY OF THE COURT—DUTY OF JURY.—*Held*, that the court should have disregarded the request of the jury for instructions as to their duty in recommending the defendant to the mercy of the court. The duty of the jury is to find a verdict as to the guilt or innocence of the defendant.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

R. M. Beatty, for Appellant.

M. A. Murphy, Attorney General, for Respondent.

By the Court, LEONARD, C. J.:

Appellant was convicted of murder of the second degree. This appeal is taken from the judgment and from an order overruling a motion for new trial. At the trial appellant testified in his own behalf, and in substance stated that, at the time of the homicide, he and Garcia, the deceased, were friends; that he had no reason for killing him, and no desire to do so, and that Garcia's death was the result of an unintentional discharge of his pistol.

The court instructed the jury, if they believed from the evidence, that the deceased met his death by the uninten-

tional discharge of the pistol they must acquit the defendant; but the following instruction was also given:

"You are instructed that in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the court.

"The foregoing is a copy of the law of this state giving defendants the privilege of testifying in their own behalf; and from it you will observe that you are the sole judges of the *degree* of credibility which such testimony shall receive; and you are instructed that you are at liberty to believe all the testimony of the defendant, or you are at liberty to disbelieve the whole thereof, or you may believe a portion of his testimony and disbelieve a portion. In all cases, jurors should receive such testimony with great caution—for when one is being tried for a capital offense the temptation to pervert or distort the facts in favor of himself is very great."

In our opinion, the recent decision of this court in the case of *The State* v. *Johnson and O'Brien*, is decisive of this appeal, and that on principle, as well as upon the authority of that case, the last portion of the instruction quoted can not be upheld. Courts can not so charge a jury as to impress upon their minds that any witness has testified falsely. Jurors may be informed as to the matters to be considered in determining the credibility of witnesses, but they can not be instructed, directly or indirectly, that any witness has perverted or distorted the facts. And when a defendant in a criminal case makes himself a witness, he has the right to have his testimony received and considered according to the rules adopted in relation to other witnesses. The last part of the instruction under consideration advised the jury to look upon the testimony of defendant with suspicion because he was charged with a capital offense. An innocent person may be charged with crime. If so, his case is indeed a rare exception, if he is tempted to distort the facts, because truth will then serve him best.

Argument for Appellant.

We think, also, that the court should have disregarded the request of the jury for an instruction as to their rights and duties in recommending the defendant to the mercy of the court. The sole duty of the jury is to declare by their verdict whether the defendant is guilty or not guilty.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

[No. 1,008.]

G. W. G. FERRIS, APPELLANT, *v.* THE CARSON WATER COMPANY, RESPONDENT.

CONTRACT—DAMAGES FOR BREACH OF—PRIVITY—PROPERTY DESTROYED BY FIRE.—The owner of property which is destroyed by fire, can not maintain an action to recover damages from a water company, on the ground that the property was destroyed by the failure of the water company to furnish a supply of water as required by the terms of its contract with the town, there being no privity of contract between the parties to the action.

IDEM—INTEREST IN PROPERTY MUST BE CERTAIN AND SUBSTANTIAL.—The owner of property destroyed by fire, upon assignment, sought to recover damages upon the ground that the municipality had such an interest in the property as to give it a right of action: *Held*, that the right of taxation vested in the municipality did not create an interest in the property but only an expectation dependent upon contingencies, and that this was too remote to be the foundation of a right of action.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

N. Söderberg, for Appellant:

I. Defendant is estopped by the contract from denying the interest of the city in the property, or its authority to make the contract. Having made and ratified the contract and taken the benefits which it confers, defendant must also bear the obligations which it imposes. (Herman on Estoppels, secs. 467–471, 473, 474; *Stevenson* v. *Newnham*, 13 C. B. 302; *Atkinson* v. *Newcastle and G. W. Co.*, 6 Ex.

(Law Rep.) 404; *People* v. *Common Council of Utica*, 65 Barb. 9, 21; *Argenti* v. *San Francisco*, 16 Cal. 255.)

II. The city had an insurable interest in the property. It had a reasonable expectation of gain in the shape of taxes to be derived from the property which was destroyed. (3 Kent's Com., 3d ed., 275–278; May on Insurance, secs. 76, 102, 109; Bliss on Life Ins. 35–37; *State* v. *Rhoades*, 7 Nev. 434; *Morrell* v. *Trenton Mut. Life and Fire Ins. Co.*, 10 Cush. 282.)

III. By the contract between the city and defendant the latter insured the property against loss by fires caused by its own failure to furnish water, or by its misconduct in preventing water from flowing to the hydrants. (*Atkinson* v. *N. & G. W. Co.*, *supra*.)

IV. The measure of the city's damages is the value of the property destroyed through defendant's negligence. (*Richmond* v. *Dubuque & S. C. R. R. Co.*, 26 Iowa, 191; *Philadelphia, Wilmington etc. R. R. Co.* v. *Howard*, 13 How. 308, 326, 343, 344; *Hoy* v. *Gronoble*, 34 Pa. St. 9; *Hendricks* v. *Stewart*, 1 Tenn. 476; *Rodgers* v. *Mechanics' Ins. Co.*, 1 Story, 603; *Lawson* v. *Price*, 45 Md. 123; Sedg. on Dam. 106, (104), 112 (109), 115 (112), 116.)

V. Defendant's negligence was the natural and proximate cause of the injury. (3 Parsons on Contracts, 179; *Milwaukee etc. R. R. Co.* v. *Kellogg*, 94 U. S. 469.)

VI. The city's demand was assignable. (Burrill on Assignment, sec. 100, and cases cited.)

VII. The city was competent and authorized to act as the agent of its inhabitants. (Story on Agency (1874), sec. 7; *People* v. *Com. Council of Utica*, 65 Barb. 21.)

VIII. A third party may maintain an action on a contract made with another for his benefit. (1 Parsons on Contracts, 466 *et seq.*; 3 U. S. Dig. 524, sec. 2444; *Alcalde* v. *Morales*, 3 Nev. 132; *Bristow et al.* v. *Lane et al.*, 21 Ill. 194.)

IX. Defendant owed a duty to the community and to plaintiff, to use reasonable care and diligence not to frustrate means in use to extinguish an existing fire. (Wharton on Negligence, 98; *Mott* v. *Hudson R. R. Co.*, 8 Bosw. 355.)

R. M. Clarke, for Respondent:

I. Neither the city nor appellant has an action against respondent for the value of premises destroyed. The city had no interest in the property destroyed as owner, nor had it any present interest of any kind. The mere right of future taxation can not lay the foundation to support a present demand of the kind in question.

II. The appellant had no action in his own right for respondent's failure to fulfill its contract with the city. He was not a party to that contract. He did not stand in privity with the city, and can not sue respondent upon a contract in which he had no legal interest. (*Davis v. Clinton Water Works Co.*, 54 Iowa, 59; *Kahl* v. *Love*, 37 N. J. L. 5; *Atkinson* v. *Newcastle etc. Water Co.*, L. R., 2 Ex. Div. 441; *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn. 24; *Vrooman* v. *Turner*, 69 N. Y. 280; Wharton on Negligence, secs. 438, 440; Sher. & Redf. on Neg., sec. 54.)

By the Court, BELKNAP, J.:

The complaint in this case contains two counts, to each of which the defendant demurred generally. The demurrer was sustained by the district court, and the case comes before us upon an exception to this ruling. In one count it is alleged that the defendant entered into a contract with the town of Carson City, a municipal corporation, on behalf of and for the benefit of its inhabitants, to supply it with water for the extinguishment of fires. That for this purpose fire plugs were established at various places in the town, and, among other places, at a point within a convenient distance of plaintiff's building. That a fire occurred in premises adjoining plaintiff's, and by reason of the failure of defendant to keep the pipes connecting with the fire plugs charged with water under sufficient pressure, as was its duty under the contract, the fire communicated to plaintiff's building and destroyed it. That in consideration of the contract and of moneys paid thereunder by the town of Carson City to defendant, it became liable

unto plaintiff for the damages arising from the neglect above mentioned.

The question presented by this count is whether, upon a breach of contract between the municipality and the water company, the plaintiff, whose property was destroyed through the failure of defendant to perform its obligation, has a right of action for damages.

It will be observed that plaintiff is not a party to the contract. It is a general rule of law that a stranger to a contract can not claim its benefits in an action upon it. An exception to the rule exists in favor of persons for whose benefit a contract has been made, and it is urged in support of the declaration that as this contract was made for the benefit of plaintiff and the other taxpayers and residents of the town, the case falls within the exception.

But a third person, not a party to a contract and for whose benefit it may have been made, does not in all cases have a right of action upon it. To entitle him thereto, there must be some privity between him and the promisee, and some obligation or duty owing from the latter to him, which would give him a legal or equitable claim to the benefit of the promisee or an equivalent from him personally. "A legal obligation or duty owing from the promisee to him" (the person for whose benefit the contract is made) "will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration with the promisee, the obligation of the promisee furnishing an evidence of the interest of the latter to benefit him, and creating a privity by substitution with the promisor." (*Trooman* v. *Turner*, 69 N. Y. 284.)

Other exceptions doubtless exist, but the plaintiff's case is within none of them.

The board of trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature, contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property-holders of

the town, but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist in order to give him a right of action upon the contract. (*Davis* v. *Clinton Water Works*, 54 Iowa, 59; *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn. 24.)

The other count sets forth, in addition to the matter above stated, that prior to the destruction of the plaintiff's premises he had been accustomed to pay, and but for defendant's negligence aforesaid would have continued to have paid, a large amount of money annually for taxes to the town of Carson City. That by reason of the failure of defendant to perform its obligation, the town of Carson City was damnified in the sum of one thousand dollars by diminution of its taxable property.

An assignment and ownership in plaintiff of the demand and right of action of the town against the defendant is set forth. The question presented by this count is whether the municipality had such an interest in the property destroyed as to give it a right of action against the defendant. We have not been referred to any authority supporting this declaration, and we apprehend none can be found. The cases to which we have been referred in support of the theory that the town had such an interest in the property as would entitle it to recover upon this count are insurance cases, and are inapplicable to the question here presented. There is a wide difference between the interest that will entitle a party to recover in an action for a tort and an insurable interest.

"An insurable interest," said the supreme court of Iowa, in *Warren* v. *The Davenport Fire Insurance Co.*, 31 Iowa, 468, "is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of the injury to it."

In actions of the character of the present one the interests

in the property destroyed, in order to be the basis of an action, should be certain and substantial. The right of taxation vested in the authorities of the city by the legislature did not create an interest, but rather an expectation, which was subject to have been defeated by contingencies that may have arisen, and was altogether too remote to be the foundation of a right of action.

The order and judgment of the district court are affirmed.

[No. 1,030.]

R. V. BORDEN, RESPONDENT, *v.* C. T. BENDER, APPELLANT.

STATEMENT ON MOTION FOR NEW TRIAL—AUTHENTICATION OF.—A certificate of the clerk to the effect that no amendments to the statement have been filed, is such an authentication as is required by section 197 of the civil practice act.

APPEAL from the District Court of the Second Judicial District, Washoe County

The facts appear in the opinion.

W. Webster, for Appellant:

The statement on motion for a new trial is not sufficiently authenticated. (*Doyle* v. *Seawell*, 12 Cal. 425; *Paige* v. *O'Neal*, Id. 492; *Linn* v. *Twist*, 3 Id. 89; *Quivey* v. *Gambert*, 32 Id. 304; *Vilhac* v. *Biven*, 28 Id. 409; *Cosgrove* v. *Johnson*, 30 Id. 509.

Haydon & Queen, for Respondent.

By the Court, BELKNAP, J.:

The statement on motion for new trial in this case is accompanied by the certificate of the clerk of the district court to the effect that no amendments were filed. The only question presented upon this appeal is whether this is such an authentication of a statement on motion for new trial as is contemplated by section 197 of the practice act. This section, among other things, provides: "When the state-

Points decided.

ment is agreed to, it shall be accompanied with the certificate, either of the parties themselves, in fact, or their attorney, that the same has been agreed upon and is correct. When settled by the judge or referee, it shall be accompanied with his certificate that the same has been allowed by him and is correct. When no amendments have been filed, the statement shall be accompanied with the certificate of the clerk of that fact."

The evident purpose of the statute in requiring the statement to be accompanied with one of the certificates mentioned is, that it shall thereby be authenticated. When no amendments are offered, the correctness of the proposed statement is assumed. The fact that no amendments are filed is required to be proven by the certificate of the clerk, and this certificate accompanying the statement authenticates it. (*White* v. *White*, 6 Nev. 20; *Overman S. M. Co.* v. *American M. Co.*, 7 Id. 312.)

The order of the district court granting respondent a new trial is affirmed.

[No. 1,047.]

THE STATE OF NEVADA, RESPONDENT, *v.* AH CHEW, APPELLANT.

INDICTMENT—STATUTORY OFFENSE—NEGATIVE EXCEPTIONS.—In an indictment for a statutory offense, it is only necessary to state the negative to an exception to the statute, when the exception is such as to render the negative of it an essential part of the definition or description of the offense charged.

IDEM.—It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not.

OPIUM ACT—CONSTITUTIONALITY OF.—Section 1 of the Opium Act (Stat. 1877, 69) does not conflict with any of the provisions of the constitution of this State.

IDEM—RESTRICTION UPON SALES OF OPIUM.—Under the police power and in the interest of good morals, the good order and peace of society, for the prevention of crime, misery, and want, the legislature has authority to place such restrictions upon the sale or disposal of opium as will mitigate, if not suppress, its evils to society.

JURY LAW—FOURTEENTH AMENDMENT—TREATY WITH CHINA.—The jury law of this State does not conflict with the fourteenth amendment of the constitution of the United States, or with sections 1977, 1978, Rev.

Argument for Appellant.

Stat. U. S., or with article 6 of the treaty between the United States and China of July 28, 1868.

IDEM—RIGHT OF CITIZENSHIP—NOT CONFERRED UPON CHINAMEN.—The right of citizenship is not conferred by the amendments to the constitution of the United States, or the treaty between the United States and China, upon the Mongolian race, except such as are born within the United States.

IDEM—CITIZENS MAY BE EXCLUDED AS JURORS.—The privilege, or duty, of being a juror is not always an incident of citizenship.

IDEM—EQUAL PROTECTION TO PERSONS.—The State has the right to prescribe the qualifications of its jurors, provided it does not discriminate against persons because of their race or color. A mixed jury in a particular case is not essential to the equal protection of the law, and is not guaranteed by the fourteenth amendment to the constitution of the United States.

SUFFICIENCY OF EVIDENCE.—*Held*, that there was some evidence to sustain the verdict of the jury.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The testimony in this case was, briefly, to the effect that Frank Connor, acting in concert with the officers of Eureka county, called at the defendant's house about two o'clock A. M., knocked at the door and woke up the defendant, and told him that he (Connor) was very sick and must have some opium. Defendant at first refused to get up, but after some threats upon the part of Connor, he got up. When he came to the door Connor handed him fifty cents and told him to go and get some opium. Defendant got the opium, gave it to Connor, and was thereafter immediately arrested by the sheriff.

E. R. Garber and *Alexander Wilson*, for Appellant:

I. The law under which the venire was issued is unconstitutional and void. (14th Amendment Constitution U. S.; secs. 1977, 1978, Rev. Stat. U. S.; Treaty with China July 28, 1868; *Strauder* v. *West Virginia*, 100 U. S. 303.) The civil rights of a Mongolian or yellow person are identical with those of an African, or black person, and are protected by the constitutional amendments and the acts of congress in relation thereto, in precisely the same manner as the rights of an African. The discrimination of our jury

law is against a person because of his race or color. The right which a state may claim, to restrict the jury list to citizens, is a right which can not be exercised when by its exercise persons of a peculiar race or color are in any way excluded from the full and equal benefit of all laws by reason of their race or color alone.

II. The effort of the legislature to regulate the sale and disposal of opium went beyond its power and transgressed the bounds of its authority. Since its discovery, opium has held its place in the commercial world as valuable property. Acknowledged to be so, it was entitled to and did receive the same protection and was accompanied by the attributes and incidents which pertain to all recognized subjects of property, and certainly comes within the protection of the provisions of the constitution, and it does not lie in the power of the legislature to condemn it, either directly or constructively, or to disturb an interest in it, or to pass any act the result of which diminishes or destroys its value. So long as opium is property, every incident necessary to perfect the right of property is conceded. The right of transfer or disposal is inseparable from this right. We can not imagine the right of property without the accompanying power of disposal. This act destroys the interest and value in all opium held in this state by others than druggists and apothecaries; and this is accomplished when the holder or owner is denied the right of disposal. (*Wynehamer* v. *The People*, 13 N. Y. 378; 1 Bl. Com. 138; 2 Kent's Com. 320, 326.)

III. The act impairs the obligation of a contract. Opium is exclusively an imported article, and the importer paying a duty to the United States for the privilege of importing it, there results a contract between the United States and the importer, that in consideration of the import duty, the United States agrees to, and guarantees to the importer, the right to use and dispose of his imported article in the usual manner of trade. No state legislature can nullify and set aside this right granted to the importer. In this case we see that the legislature has attempted to do this; and it is further found outside of its jurisdiction in this very matter,

making an effort to regulate a branch of commerce, a province peculiar and exclusive to the congress of the United States.

IV. It is special legislation in the interest of a designated class, inasmuch as the sale of opium is restricted to druggists and apothecaries, and they are given a monopoly of the opium trade, to the exclusion of all the world.

V. The indictment is insufficient, and does not state an offense, in this, that it does not show that the defendant therein is not within the exception mentioned in the act. (Whart. Am. Cr. L., sec. 379, and authorities there cited.)

M. A. Murphy, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

Appellant was indicted, tried, and convicted of a felony for a violation of section 1 of the "act to regulate the sale or disposal of opium," etc. (Stat. 1877, 69.) This section provides that "it shall be unlawful for any person or persons, as principals or agents, to sell, give away, or otherwise dispose of any opium in this state, except druggists and apothecaries, and druggists and apothecaries shall sell it only on the prescription of legally practicing physicians." The charging part of the indictment reads as follows: "The said defendant, Ah Chew, on the 30th day of April, A. D. 1880, or thereabouts, and before the finding of this indictment, at the county of Eureka, in the state of Nevada, did unlawfully and feloniously sell and dispose of opium, of the value of fifty cents, United States silver coin, to one Frank Connor, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nevada."

1. Appellant's counsel argue that this indictment does not state an offense, because it does not show that the defendant is not within the exceptions specified in the statute. They claim the rule to be, that if there is an exception in the enacting clause, the prosecution must negative the exception and state in the indictment that the defendant is not within it. The principle decided in *State* v. *Robey*, 8 Nev. 321, is adverse to this rule.

There are cases cited in Wharton's Cr. L., secs. 378, 379, where the language employed would seem, at first blush, to sustain the position contended for by appellant. But from a careful examination of all the authorities upon this subject, we are of opinion that it is only necessary in an indictment for a statutory offense, to negative an exception to the statute, when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged. It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not. The question is, as stated in *State* v. *Abbey*, "whether the exception is so incorporated with, and becomes a part of the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. 'It is the nature of the exception, and not its location,' which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In either case, the only inquiry arises, whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it should be negatived, otherwise it is a matter of defense." (29 Vt. 66.) (See also *Metzker* v. *People*, 14 Ill. 101; *Stanglein* v. *State*, 17 Ohio St. 461; *State* v. *Miller*, 24 Conn. 522; *State* v. *Glynn*, 34 N. H. 422; *State* v. *Wade*, Id. 491.)

The exception mentioned in section 1 does not define or qualify the offense created by the statute. The defendant can not complain that he has not been fully informed of the nature and cause of action against him. A *prima facie* case is stated in the indictment "in such manner as to enable a person of common understanding to know what is intended." (1 Comp. L. 1858.)

The question is one not only of pleading but of evidence, and where the exception need not be negatived it need not be proven by the prosecution. If the defendant was a

druggist, or an apothecary, and sold the opium upon the prescription of a legally practicing physician, it would be a defense. These facts would be peculiarly within his knowledge, and could be established by him "without the least inconvenience, whereas if proof of the negative were required the inconvenience would be very great." (1 Greenl. on Ev., Sec. 79.)

2. Section 1 of the statute above referred to does not conflict with any of the provisions of the constitution of this state. It does not interfere with the existing rights of property. It does not impair the obligation of any contract, and is not special legislation in the interest of a designated class.

It has universally been held to be the duty of every state to protect its citizens, and advance the safety, happiness, and prosperity of its people; and there is no doubt as to the power of the legislature to pass laws, like the one under consideration, designed to promote the health and protect the morals of the community at large. Statutes to regulate the sale of intoxicating liquors; to prevent and prohibit their sale to minors, to Indians, to habitual drunkards; and to close saloons on the Sabbath and on election days, have been passed in many, if not all, of the states, and have always been upheld and sustained by the several state courts and by the supreme court of the United States. (*License Cases*, 5 How. 504.)

It is not denied that the indiscriminate use of opium by smoking or otherwise tends in a much greater degree to demoralize the persons using it, to dull the moral senses, to foster vice and produce crime, than the sale of intoxicating drinks. If such is its tendency, it should not have unrestrained license to produce such disastrous results. A law prohibiting the indiscriminate traffic in this poisonous drug; and placing the trade under such regulations as to prevent abuses in its sale, violates no constitutional restraints. Under the police power, recognized in the theory and asserted in the practice of every state in the union, in the interest of good morals, the good order and peace of society, for the prevention of crime, misery, and want, the leg-

islature has authority to place such restrictions upon the sale or disposal of opium as will mitigate if not suppress its evils to society.

Wynehamer v. *The People*, 13 N. Y. 378, upon which appellant relies, is not opposed to the views we have expressed. The decision in that case was based upon the ground that the act there under consideration confiscated and destroyed property lawfully acquired by the citizen in intoxicating liquors, and provided for its seizure and destruction without due process of law. The opinions of the various justices in that case expressly recognized the right of the legislature to regulate the sale and disposal of intoxicating liquors "upon such views of policy, of economy or morals, as may be addressed to its discretion." The subsequent decisions in that state have always recognized the right of the legislature to control and regulate the traffic in intoxicating drinks.

Wright, J., in delivering the opinion of the court in *Metropolitan Board of Excise* v. *Barrie*, upon this subject says: "The right to legislate on a subject so deeply affecting the public welfare and security has not heretofore been questioned or denied, and it could not well be, for it would have been to deny the powers of government inherent in every sovereignty to the extent of its dominions. A state is not sovereign without the power to regulate all its internal commerce as well as police. The legislature exercises and wields these sovereign police powers as it deems the public good to require. It is a bold assertion, at this day, that there is anything in the state or United States constitutions conflicting with or setting bounds upon the legislative discretion or action in directing how, when, and where a trade shall be conducted in articles intimately connected with the public morals or public safety or public prosperity; or, indeed, to prohibit and suppress such traffic altogether, if deemed essential to effect those great ends of good government. * * * Is it not an absurd proposition, that such a law, by its own mere force, deprives any person of his liberty or property within the meaning of the constitution, or that it infringes upon either of these secured private

rights? Yet this is the only ground its violators can occupy to raise any question as to its validity. They are restrained of no liberty, except that of violating the law, by engaging in a forbidden traffic; and the assumption is not even plausible that the act works a deprivation of property to any one." (34 N. Y. 666.)

The supreme court of Delaware, in *State* v. *Almond*, 2 Houston, 612, declared the act (for the suppression of intemperance) prohibiting the sale of intoxicating liquor for any other than "mechanical, chemical, and medicinal purposes only, and pure wines for sacramental use," to be constitutional.

The *Wynehamer case* was there elaborately reviewed, and it was shown that each of the justices who decided against the constitutionality of the prohibitory liquor law of New York based his opinion on grounds of objection that were not applicable to the Delaware act, and sustained the principle of restrictive legislation to the full extent required to support its validity. After an examination of many authorities upon the subject under consideration, we are prepared to reiterate and indorse the statement of Wright, J., in the opinion from which we have quoted, that: "No one heretofore has questioned, on constitutional grounds, the validity of such an enactment, or called upon the judiciary to declare it void, and, perhaps, would not at this time, except as emboldened by the inconsiderate *dicta* of some of the judges in the case of *Wynehamer* v. *The People*."

3. Appellant contends that the court erred in overruling his challenge to the panel of trial jurors, "because the law under which the venire was drawn is unconstitutional and void, in this: that it conflicts with the fourteenth amendment of the constitution of the United States, with sections 1977 and 1978 (Rev. Stat. U. S.), and article 6 of the treaty between the United States and China, of July 28, 1868.

This position is wholly untenable. It can not be maintained upon any sound reasoning, and is not supported by any authority. In construing the constitutional amendments and the civil rights bill, courts have always considered the history of the times when they were adopted, the

general objects sought to be accomplished, and the evils they were designed to remedy. Their object was to secure to the African the civil rights which the white persons of the United States enjoyed, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by any state.

The amendments were primarily designed to give freedom to all persons of the African race within the United States, to prevent their future enslavement, to make them citizens, to prevent discrimination against their rights as freemen, and to secure to them the privileges of the ballot. The language used necessarily extends some of the provisions to all persons of every race and color; but their general purpose is so clearly in favor of the African race, that it would require a very strong case to make them applicable to any other. (*Slaughter-house Cases*, 16 Wall. 37; *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, Id. 313; *Ex parte Virginia*, Id. 339.)

The amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United States. The treaty between the United States and China did not confer upon the Chinese, coming to this country, the right of citizenship. The same section which guaranteed to the Chinese subjects certain "privileges, immunities, and exemptions in respect to travel or residence," contains the following proviso: "But nothing herein contained shall be held to confer naturalization upon * * * the subjects of China in the United States." (Section VI.)

The statute of this state provides that "every qualified elector of the state * * * is a qualified juror of the county in which he reside." (1 Comp. L. 1051.) This statute does not deprive appellant of any right secured to him by the constitution, laws, or treaty. The Mongolian or yellow race, to which appellant belongs, are denied the right to serve as jurors because they are aliens, and not on account of their color. There is no discrimination in the statute against any person because of his race or color.

Appellant had all the privileges guaranteed to the subjects of the most favored nation. He had the same rights

as an unnaturalized white person from England, Germany, or any other foreign country. No greater rights could have been secured to him in the circuit court of the United States. The qualification of jurors is the same in the United States courts as in the state courts. (Rev. Stat. U. S., sec. 800; Stats. U. S., 1874–5, p. 336, sec. 4.) The privilege, or duty, of being a juror is not always an incident of citizenship. There are citizens of the United States that are in the respective states denied the right to sit as jurors in the trial of civil or criminal cases.

Women are citizens, but they are not, under the constitution and laws of this state, "qualified electors." They have no right to vote or hold any office. Yet they have the same right to a fair and impartial trial by jury as any other person. Some of the states limit the age of male citizens who are declared competent to serve as jurors. Yet it has never been held that a citizen over or under the prescribed age was denied any right secured to him by the constitution and laws of the United States. All persons, whether male or female, old or young, citizens or aliens, white, black, or yellow, are equally protected in the right of trial by a fair and impartial jury, indifferently selected, without discrimination because of their race or color.

The statute of West Virginia, which was called in question in *Strauder* v. *West Virginia*, *supra*, reads as follows: "All *white* male persons, who are citizens of this state, shall be liable to serve as jurors." The supreme court of the United States declared this law to be unconstitutional, because it singled out and expressly denied to the colored race "all right to participate in the administration of the law as jurors, *because of their color*, though they are citizens and may be in other respects fully qualified."

In the discussion of the questions there involved, the court expressly recognized the general principles we have announced, and declared, that every state has the right to prescribe the qualifications of its jurors, provided it does not discriminate against persons because of their race or color. This is the language used: "We do not say that within the limits from which it is not excluded by the

amendment a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history, it is clear that it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discrimination against those who belong to it."

The argument that equal protection to persons can only be secured by allowing persons of the same race or color to act as jurors in cases affecting their interests, is fully answered by the supreme court of the United States in the case of *Virginia* v. *Rives*, *supra*, in reply to the application of two colored persons to have their cause removed from the state court to the circuit court of the United States. The statute of Virginia provided that all male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the constitution and laws, are liable to serve as jurors. The law of that state, like the law of this state, did not discriminate against any person because of his race or color. Petitioners alleged that the grand jury that indicted them, and the petit jury that tried them, were composed wholly of the white race, and that no one of their race had ever been allowed to serve as jurors, in the county where they were tried, in any case in which a colored man was interested. The court say that these assertions "fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected. Nor did the refusal of the court, and of the counsel for the prosecution, to allow a modification of the venire, by which one third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right se-

cured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person, by the law of the state, or by any act of congress, or by the fourteenth amendment of the constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the state court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia or by any federal statute. It is not, therefore, guaranteed by the fourteenth amendment or within the purview of section 641."

The question whether any person of the Mongolian race can become a naturalized citizen of the United States is not involved in this case, and does not, therefore, merit any discussion.

4. The evidence in this case was very slight and in some respects very unsatisfactory. But we are not prepared to say that there was no evidence to sustain the verdict of the jury.

The judgment of the district court is affirmed.

[No. 1,040.]

THE STATE OF NEVADA, RESPONDENT, *v.* AH GONN, APPELLANT.

OPIUM ACT CONSTITUTIONAL—INDICTMENT SUFFICIENT.—Judgment affirmed upon the authority of *The State of Nevada* v. *Ah Chew*, *ante*, 50.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

Alexander Wilson, for Defendant.

M. A. Murphy, Attorney General, for Respondent.

By Court, HAWLEY, J.:

The questions raised by appellant are substantially the same as were presented in the case of *The State* v. *Ah Chew*, *ante*, 50.

Upon the authority of that case the judgment of the district court is affirmed.

[No. 1,046.]

THE STATE OF NEVADA, RESPONDENT, *v.* CHING GANG, APPELLANT.

OPIUM ACT—SALE BY PHYSICIANS.—To make a defense for the sale of opium by a practicing physician complete, the defendant must show that he comes within the provisions of the "act to prevent the practice of medicine and surgery by unqualified persons" (Stat. 1875, 47).

APPEAL from the District Court, Sixth Judicial District, Eureka County.

The facts appear in the opinion.

Alexander Wilson and *C. G. Hubbard*, for Appellant.

M. A. Murphy, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

This case is similar to that of *The State* v. *Ah Chew*, *ante*, 50. The only question which is not disposed of by the opinion in that case is as to the correctness of the ruling of the court in refusing to allow the defendant, who was a witness in his own behalf, to answer the question, "Are you a practicing physician?" The defendant had the right to show, if he could, that he was a legally practicing physician, and that he sold the opium as a prescription. But in order to make his defense complete it was necessary for him to show that he came within the provisions of the "Act to prevent the practice of medicine and surgery by unqualified persons." (Stats. 1875, 47; *Ex parte Spinney*, 10 Nev. 323.)

The record shows that when the question was asked, the

counsel for the state objected to the defendant's answering it unless "he showed a compliance with the laws of the state." When this objection was made, we think it was the duty of the defendant to state, if it was the truth, that he proposed to show a compliance with the law. Having failed to make any such statement, and failed to offer any further proof, we are of opinion that the court did not err in sustaining the objection.

The judgment of the district court is affirmed.

[No. 1,063.]

EX PARTE ANTOINE LORRAINE.

HABEAS CORPUS—FUGITIVE FROM JUSTICE.—To hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state: 1. That a crime has been committed in the other state. 2. That the accused has been charged in that state with the commission of such crime. 3. That he has fled from justice, and is within this state. (1 Comp. L., 2278–2286.)

IDEM—PROPERTY BROUGHT INTO THIS STATE.—To hold a fugitive from justice, upon the ground that the money taken by him, in committing a robbery, was brought into this state, there must be a complaint charging him with this offense substantially in the language of the statute.

HABEAS CORPUS before the Supreme Court.

The facts sufficiently appear in the opinion.

A. C. Ellis, for Petitioner.

H. F. Bartine, District Attorney of Ormsby County, for State.

By the Court, HAWLEY, J.:

In order to hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state: 1. That a crime has been committed in the other state. 2. That the accused has been charged in that state with the commission of such crime. 3. That he has fled from justice and is within this state.

Points decided.

(Criminal Pr. Act, secs. 651-653; 1 Comp. L., 2278-2286.)

The complaint upon which petitioner was arrested accused him of having committed the crime of robbery in Alpine county, California, on the twenty-eighth of February, 1881. The commitment recites the same facts. Neither the complaint, warrant of arrest, nor commitment avers that he is *charged* with such crime in the state of California. The proceedings in so far as they are based upon the provisions of the criminal practice act relating to fugitives from justice are entirely null and void. (*Matter of Edwin Heyward*, 1 Sandf. 701; *Matter of Leland*, 7 Abb. (N. S.) 64; *Matter of Rutter*, Id. 68; *State* v. *Hufford*, 28 Iowa, 391; *Ex parte White*, 49 Cal. 433.)

It is, however, claimed that petitioner should be held to await the requisition of the governor of the state of California under the provisions of section 67 of the act concerning crimes and punishments (1 Comp. L. 2373), because, as claimed by the prosecution, the money taken by petitioner was by him brought into this state.

It would be necessary, in order to authorize the magistrate to commit petitioner under this provision of the statute, to have a complaint filed setting forth the offense substantially in the language of the statute. Upon this point it is proper for us to state that we have examined the testimony taken before the committing magistrate, and that, in our opinion, it is not sufficient to warrant the detention of the petitioner upon this ground.

The petitioner must be discharged from custody. It is so ordered.

[No. 1,022.]

THE IOWA MINING COMPANY, APPELLANT, *v.* THE BONANZA MINING COMPANY, RESPONDENT.

DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE—WHEN RIGHTS ARE WAIVED BY FILING A DEMURRER AND ANSWER.—Plaintiff, in an action to determine the question of the right of possession to certain mining ground for which the defendant had applied for a patent, failed to pros-

ecute its suit with reasonable diligence, by delay in serving the summons. Defendant made no motion to dismiss the case until after service of summons, and after it had appeared in the action, by attorneys, and filed a demurrer and an answer to plaintiff's complaint: *Held*, that, by raising the issues of law and fact, the defendant waived its right to move for a dismissal of the action upon the ground that the summons had not been served within a reasonable time.

IDEM—WAIVER OF THE WAIVER TO DISMISS.—When defendant moved to dismiss the case, the plaintiff consented to a hearing of the motion upon its merits: *Held*, that plaintiff by not moving to dismiss the defendant's motion, waived the irregularities and waiver of defendant.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

Elliott and Thomas, for Appellant:

I. Even though the court should be of the opinion that there has been a want of diligence on the part of appellant in the prosecution of this action, yet now that it is at issue on the merits, on the calendar and ready to be set for trial, the respondent having neglected to make its motion to dismiss before it appeared in the action and before it was at issue, the court will say that it is too late now to entertain such motion, and that the case should now go on and be tried on its merits. No suit to determine the question of title to mining ground, after it is at issue, should be dismissed upon a mere technicality like that presented in this case. Indeed, it should not be dismissed at all, where it is at issue before the motion is made, and where the plaintiff is ready and desires to have it tried on its merits. A conclusive reply to such a motion as this is: "The case is at issue and the plaintiff is ready and desires to go on with the trial on the merits of the case." (*Reynolds* v. *Page*, 35 Cal. 301–302; *Grigsby* v. *Napa Co.*, 36 Id. 589; *Eldridge* v. *Kay*, 45 Id. 49.)

II. There is no law requiring the summons and complaint to be served within any specific time after comencing the action. After a defendant has been properly served with a summons and certified copy of the complaint in an action, it is incompetent for him to object that he was not

served sooner unless he can show some law requiring the service to be made prior to the time it was actually made.

Lewis & Deal, for Respondent:

The argument that respondent's negligence is excusable because the appellants delayed for such a length of time in making its motion to dismiss amounts to this, that the greater negligence a party has been guilty of, in prosecuting his action, the more excusable such negligence is. The appellant was not bound to take any notice of the action, until properly brought into court by service of process upon it. This was not done until nearly two years and a half after the action was commenced, and just as soon the appellant appeared, it prepared for the motion to dismiss. The answer was filed, it is true, but that was necessary to show that appellant had a meritorious defense to the action, and it was upon the answer, as well as upon the affidavits and other testimony, that the motion was granted.

By the Court, LEONARD, C. J.:

On the eleventh day of January, 1876, the respondent made application for a patent of the mineral land described in the complaint herein, and gave notice thereof according to law.

On the eleventh of March, 1876, appellant filed an adverse claim, and on the seventh of April following, commenced this action in the proper court to determine the question of the right of possession between appellant and respondent, by filing a complaint and issuing a summons, which, on the day of issuance, was placed in the hands of the sheriff of the county, but without directions as to service, and without payment of any fees. The summons remained in the sheriff's hands without service until the expiration of his term of office, when it was returned to the clerk of the court. On the twelfth of July, 1879, the same summons was placed in the hands of the then sheriff for service, and was served upon respondent September 4, 1879. On the eleventh of September following, respondent appeared by filing and serving a general demurrer to the com-

plaint, without reserving the right to move for a dismissal, and without notifying the court or appellant of its intention to do so. Thereafter, on the thirteenth of September, respondent withdrew its demurrer, with leave of the court to answer within fourteen days, and to move to dismiss the action for want of prosecution with reasonable diligence; and, at the same time, appellant's attorneys were notified verbally, in open court, by the attorneys of respondent, that the latter would move the court to dismiss the action for the reason above stated. On the twenty-fifth of September, 1879, respondent, by its attorneys, filed and served its answer to the complaint, and denied all the material allegations therein contained. In the answer there was no reservation of the right to move for dismissal. On the first of October, 1879, upon the affidavit of one of respondent's attorneys, the court shortened the time of notice of motion to dismiss, so that the same could be heard on the fourth of October. In said affidavit it was averred that, "said action is at issue, the said defendant having heretofore filed an answer herein, denying all the material allegations of the complaint in said action; that the parties to this action have, under the practice adopted by this court, the right to have said cause set down for trial next Monday, the sixth day of October, 1879, for some day during the October term of said court; that said defendant intends to move said court to dismiss said action for want of a prosecution thereof with reasonable diligence, and has not been able to procure the affidavits upon which to base said motion until this day."

On the same day, October 1, respondent filed and served a notice of motion to dismiss, to the effect, that on the fourth day of October, 1879, it would so move the court, upon the ground stated, and that said motion would be made "on the complaint herein, summons, and sheriff's return thereon, answer, records of the court in said cause, and the affidavits hereto annexed."

On the eighteenth of October following, the motion was heard, both parties being present by their attorneys; and on November 1, 1879, the court "ordered and adjudged,

that the action be dismissed for want of prosecution with reasonable diligence by plaintiff; that plaintiff take nothing thereby, and that defendant have and recover of plaintiff its costs, taxed at twenty-one dollars and five cents."

On the fourth day of November, judgment was entered accordingly. This appeal is taken from the judgment, from an order denying the motion for a new trial, and from the order of dismissal. Appellant's third assignment of error is as follows: "Insufficiency of evidence to justify the decision and judgment of the court, in this: that said motion to dismiss for want of prosecution, with reasonable diligence, was not made until service of the summons in the action was had on the defendant, and a demurrer and an answer filed by the defendant therein. This action was at issue, on the calendar, and ready to be set for trial on the merits, before the motion to dismiss for want of reasonable diligence in the prosecution was made."

The question first presented for our consideration, then, is this: Conceding that appellant did not prosecute the action with reasonable diligence, as required by section 2326, Rev. Stats. U. S., and that the action ought to have been dismissed, if respondent had taken the proper steps therefor before demurring and answering, was it error to enter a judgment of dismissal under the circumstances detailed above? By raising issues of law or fact, or both, did respondent waive its right to move for a dismissal of the action? Respondent claimed the mining ground described in the complaint adversely to appellant, and under the statute above referred to it was required, "within thirty days after filing its adverse claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment." The same section also provided that "a failure so to do shall be a waiver of his adverse claim."

The court below held that the action had not been prosecuted with reasonable diligence, and, consequently, that the adverse claim had been waived. But did not respondent, by its action, waive appellant's waiver?

Section 333 of the civil practice act provides that, if the appellant shall omit to make a statement within twenty days after the entry of judgment, he shall be deemed to have waived his right thereto. It can not be doubted under that statute, that a failure to make a statement on appeal within the time limited is as much a waiver of the right to make such statement at any time as, under the United States statute, a failure to prosecute this action with reasonable diligence was a waiver of appellant's adverse claim.

In *Johnson* v. *Wells, Fargo & Co.*, 6 Nev. 228, there was a statement on motion for new trial, and the appeal was taken from an order denying that motion and from the judgment. There was, in addition, a stipulation to this effect: "It is stipulated in the above action that the statement on motion for new trial herein, as on file and settled, shall be also the statement on appeal, and may be used and referred to with like effect as if the same had been duly filed and settled as a statement on appeal herein." The stipulation was not made until *twenty-four* days after the order denying the motion for new trial, and the respondent objected to a consideration of the statement, because "no statement on appeal was filed or served within twenty days after the motion for new trial was overruled;" citing section 332 of the civil practice act, which provides that, "when the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement."

Inasmuch as the appeal had been taken from the order denying the motion for new trial, as well as from the judgment, the court held that, under section 197, the statement on motion for new trial might be used and treated as a statement on appeal. But the court gave an additional reason why, in that case, the statement might be considered as a statement on appeal, as follows:

"If, however, there was any necessity for considering the statement in the record as a statement on appeal, distinct from its statutory office as a statement on new trial, the stiplation would allow it; for, although by failure to make the

statement within twenty days after the entry of the judgment, appellant would, in the absence of any agreement to the contrary, be held to have waived the same (Stat. 1869, sec. 333, p. 248), yet such waiver could be waived by the opposite party in any case; and has been so here, if there is any meaning or force in language."

The doctrine announced by the court in that case, in considering the effect of the stipulation alone, without the aid of the statute (section 197), applies with great force here. There the respondent did not agree to waive the laches of appellant, or what would have been such without section 197 of the practice act, but he did agree to what was inconsistent with the idea that he desired, or proposed, to take advantage of them. In the absence of section 197, the court say he might have treated appellant's failure to file and serve statement within twenty days as a waiver of the right to do so at all. But instead of proceeding thus, he agreed that the statement filed at the time stated should be the statement on appeal, and might be used as such. In other words, he waived the irregularity complained of, admitting it to be such. In this case, if without saving its right to move for a dismissal, respondent had agreed in writing that the cause should be tried according to the rules and practice of the court upon such issues of law and fact, or either, as it might raise, there would have been a waiver of all prior delay on the part of appellant in making service; and we are of opinion that filing and serving its general demurrer on the eleventh of September, three days before the expiration of the time allowed by law for appearing or otherwise proceeding in the action, and subsequently answering, as before stated, before moving or giving any legal notice of motion to dismiss, also constituted a waiver of delay in the prosecution of the action. When the general demurrer was filed and served there was no attempt to preserve the right to move a dismissal, and all that was ever done before answering was this: On the thirteenth of September, two days after the demurrer had been filed and served, the attorneys of respondent gave appellant's attorneys verbal notice in open court that respondent would

move to dismiss the action for reasons stated; and on the same day the demurrer was withdrawn fourteen days were granted in which to answer, and leave was given respondent to move to dismiss. In relation to the verbal notice in open court, it is enough to say: 1. That it came too late, being two days after the filing and serving of the demurrer; 2. It was a case wherein written notice was required and verbal notice was nugatory. (Civ. Pr. Act, secs. 491 *et seq.*; *Pratt* v. *Rice*, 7 Nev. 126.)

Under certain circumstances, nothing to the contrary appearing, we might presume, in support of the judgment, that legal notice was expressly waived when the verbal notice was given in open court; but here it is evident that there was not such waiver, because, subsequently, legal notice was given in accordance with an order of the court shortening the time therefor.

At the time of the notice given in court respondent did not know when it would make its motion, and the time had not been shortened. Such being the case, respondent could not have given notice of any definite time when the motion would be made; and, as we understand the facts to be, the notice was to the effect simply, that respondent at some subsequent date would move to dismiss. Although given in open court, that notice, without a sufficient waiver of written notice, was of no more consequence than it would have been if given upon the public streets. It was purely gratuitous, and neither bound nor affected either party.

There is nothing before us to show that appellant waived written notice of motion to dismiss, and if such was the fact it is incumbent upon respondent to show it by the record.

In *White* v. *White*, 6 Nev. 25, respondent moved this court to strike the statement, etc., from the transcript, on the ground that there was no authentication or identification. The appellant replied that the objection came too late; that by failing to call the attention of the court below to the defects complained of, and arguing the motion for new trial on its merits, respondent waived her objection. Quoting and adopting the language of the court in *McWilliams* v.

Hirschman, 5 Nev. 265, the court said: "The only ground, then, upon which it can be claimed that this objection can not be raised in this court is, that it was waived by the appellant in the court below. There is, however, nothing in the record before us to warrant the conclusion that it was waived. For aught that appears here, the objection was made at the proper time. It will not be claimed that it is incumbent on the appellant here to show that he did not waive the objection. It is always the duty of the person wishing to avoid the consequence of error in legal proceedings, upon the ground of waiver by the opposite party, to show such waiver, and not upon the person insisting on it to establish the negative." So, in this case, conceding that it was error to dismiss the action, unless the right to move therefor was in some manner saved by respondent before filing and serving its answer, we think it incumbent upon respondent to show that written notice was waived by appellant, before it can claim the benefit of the verbal notice given in open court, as a saving act.

As before stated, after the demurrer was withdrawn, time for answering was given, and leave to move to dismiss granted, but no specified time in which to make the motion was stated; and if it is true, that respondent should have given notice of its intended motion before filing its answer, or in some other manner saved its right to so move, before answering, it is fair to presume that the court expected it would do so when additional time for answering was given.

Again, if, after demurring, respondent had the right to move for dimissal, there was no reason for obtaining leave of the court to do so, for the right was absolute without an order of the court, and getting leave did not restore the right, if that had once been waived by demurring; and if there had been no waiver, the granting of leave neither gave respondent any additional rights, nor excused it for answering before moving to dismiss, or in some manner saving the right to do so thereafter. In other words, answering as respondent did, was a complete waiver of previous delay, if the same act would have been so, had no leave to move for a dismissal been granted.

Counsel for respondent say it was necessary to file an answer before moving to dismiss, "in order to show that there was a meritorious defense to the action, and that it was upon the answer, as well as upon the affidavits and other testimony, that the motion was granted." Counsel are certainly in error. Under the statute, if appellant did not prosecute the action with reasonable diligence, it waived its adverse claim, and upon showing unreasonable delay, respondent was entitled to a dismissal without the slightest allegation or proof of title or right of possession in itself. If appellant by its laches had waived its adverse claim, it had no right to maintain the action, even though respondent did not have the right of possession.

According to the rules of practice of the court below, after the answer was filed, it was the privilege of appellant to have the cause set for trial on the sixth day of October, 1879, for some day during the October term. Respondent knew that fact when it answered, and, we think, by answering, as well as demurring, without necessity, it consented that the cause might be tried upon the issues of law and fact thereby raised, in accordance with the rules and practice of the court.

Demurring and answering were tantamount to saying to the court and appellant that it was ready and willing to try those issues, and that it did not desire to take advantage of the irregularity subsequently made the ground of a motion to dismiss. They were challenges to trial notwithstanding the delay. The irregularity was waived. "An irregularity consists in the doing of some act at an unreasonable time, or in an improper manner, as in omitting to do something that is necessary for the due and orderly conduct of the suit. It may, therefore, properly be defined to be a want of adherence to some prescribed rule or mode of proceeding, and may arise in every stage of an action, from the service of the summons to the entry of satisfaction after judgment and execution. There is a marked, and in many respects, important and substantial distinction, between defects in practical proceedings, which constitute mere irregularities, or such as render the proceeding a total nullity

and altogether void. Where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of conducting it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity, and can not be made regular by any act of either party." (4 Waite's Prac. 629.) The failure to prosecute this action with reasonable diligence consisted entirely in an unwarrantable delay in obtaining service upon respondent; and being such, it was, we think, only an irregularity in the time of proceeding. If the statute provided that a summons should be served within one month or one year after issuance, and that a failure to make such service should be deemed a waiver of the claim set up in the complaint, service thereafter would be irregular, but nothing more; and if seasonably sought, relief could be had; but should a defendant appear generally and answer the allegations of the complaint, without any reservation of his right to move to dismiss, such action would undoubtedly be a waiver, and he would thereafter seek in vain to take advantage of the irregularity.

Filing an answer under such circumstances, would be taking a step in the cause, which from its nature, would assume the propriety of trying instead of dismissing it, and would be a waiver of any objections to going to trial upon the issues raised.

If, without service of summons, respondent had appeared and answered, denying all the material allegations of the complaint, and after so doing had moved to dismiss, there can be no doubt that the motion would have been too late. Its answer would have been a notice, voluntarily given, of a willingness to proceed with the trial. We are satisfied that the same result follows from demurring and answering, as was done in this case.

The following authorities sustain the conclusion arrived at upon this branch of the case: *Pearson* v. *Rawlings*, 1 East, 77, wherein Lord Kenyon said: "It is the universal practice

of the court, that where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he can not afterwards revert back to the irregularity and object to it." See, also, *D'Argent* v. *Vivant*, Id. 330; *Mayor etc.* v. *Lyons*, 24 How. Pr. 282; *Higley* v. *Lant et al.*, 3 Mich. 612; *Buel* v. *Dewey*, 22 How. Pr. 344: *Warren* v. *Glynn*, 37 N. H. 343; *Dale* v. *Radcliffe*, 25 Barb. 334; *Barber* v. *Hubbard*, 3 Code R. 171; *Baker* v. *Curtiss*, 7 How. Pr. 480; *Belt* v. *Blackburn*, 28 Md. 240; *Crull et al.* v. *Keener*, 18 Ill. 66; *Pryce* v. *Security Ins. Co.*, 29 Wis. 274; *Upper Miss. Trans. Co.*, v. *Whittaker*, 16 Id. 222; 4 *Waite's Prac.* 629 *et seq.*

But although we are satisfied that it would have been error to dismiss the action had appellant protected its legal rights after respondent's waiver of the delay in the service of summons, we are here met by another fact which justifies the order and judgment of the court.

The record shows that respondent, notwithstanding its waiver before the case was set for trial, did move to dismiss by filing and serving upon appellant's attorneys written notice of such motion. Service of the notice with affidavits attached was duly acknowledged. They were received without objection, and so far as the record shows, they were retained by appellant's attorneys.

The motion was heard on the eighteenth of October, 1879, "plaintiff and defendant appearing in open court and announcing themselves ready for said hearing." No application to dismiss the motion, because it came too late or for other reason, was made. Respondent, without objection, offered and read in evidence affidavits and documentary evidence in support of the motion, and appellant did the same in opposition thereto. The motion was argued by counsel on both sides and submitted to the court for its decision. Upon these facts, the principles enunciated in the first part of this opinion are equally applicable here. Although respondent had waived the delay in serving the summons, still the fact existed after as well as before demurring and answering, that the summons was not served until long after its issuance, and that the action had not

Argument for Relator.

been prosecuted with reasonable diligence. If appellant was willing to have the motion heard and decided, or did not object thereto upon proper ground, it in turn waived respondent's waiver, and can not now object to an order and judgment of the court which are supported by the evidence submitted. The record does not merely fail to show that appellant objected in season to a consideration of the motion, but it shows affirmatively that it did not do so, and that it consented to a hearing of the motion upon its merits; thus waiving the previous irregularities of respondent. There is sufficient evidence to support the order and judgment, and they are affirmed.

[No. 1,056.]

THE STATE OF NEVADA, EX REL. J. J. QUINN, *v.* THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, RESPONDENT.

ASSAULT—FINE AND IMPRISONMENT—COSTS.—Relator was convicted of an assault. The judgment imposed a fine of five hundred dollars, taxed the costs at three hundred dollars and fifty cents, and ordered relator to be imprisoned, as by statute provided, for the fine: *Held*, that section 46 of the act concerning crimes and punishments (1 Comp. L. 2352), authorized the imposition of the fine, and section 674 of the criminal practice act (Id. 2299) authorized the judgment for costs.

IDEM—JUDGMENT, HOW ENFORCED.—Relator could be imprisoned for the fine. The judgment for costs can be enforced only by execution.

IDEM—COST BILL.—The criminal practice act does not provide for a cost bill. The court has the power to tax the costs from an examination of the fees charged by the respective officers.

CERTIORARI—LEGALITY OF COSTS—NOT REVIEWABLE.—If the court erred in allowing any costs that were not taxable against the relator, it was not an excess of jurisdiction, and its action, in this respect, can not be reviewed upon certiorari.

CERTIORARI before the Supreme Court.

The facts appear in the opinion.

C. S. Varian, for Relator:

The action of the court in allowing costs is reviewable by certiorari. There is no statute restricting the office of

the writ of certiorari, except in civil cases. The grant of power to this court, found in the constitution, relates to this remedy as it was at common law. At common law its office was to correct errors. (Bac. Abr., Title Certiorari; Blackstone, book 4, 320, 321; *People* v. *Turner*, 1 Cal. 152; *U. S.* v. *Young*, 4 Otto, 259; *Hyden* v. *State*, 40 Ga. 476; *Gilliam* v. *State*, 32 Id. 111; *Peters* v. *State*, 9 Id. 109.)

M. A. Murphy, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

Relator contends that the district court exceeded its jurisdiction in rendering the following judgment: "Defendant, J. J. Quinn, having been duly convicted of the crime of an assault, it is hereby ordered, adjudged, and decreed that the said J. J. Quinn do pay a fine of five hundred dollars, gold coin, and costs of this action, amounting to three hundred dollars and fifty cents, making in all eight hundred dollars and fifty cents, gold coin; and it is further ordered that the defendant be confined in the common jail of Washoe county, Nevada, one day for each two dollars of said fine, so long as the whole, or any part thereof, shall remain unpaid."

From the views we entertain of this case, it is unnecessary to decide the question, argued by relator's counsel, whether the amendment to section 1 of the act in relation to fines (Stat. 1867, 44), as made in the amended act (Stat. 1869, 96), is unconstitutional or not. There are other sections of the statute, against which no objections have been urged, that gave the court authority to render the judgment. Section 46 of the act concerning crimes and punishments (1 Comp. L. 2352), authorized the imposition of the fine, and section 674 of the criminal practice act (1 Id. 2299), authorized the judgment for costs. The imprisonment of relator is only for the fine. He could not be imprisoned for the costs. (Const., art. 1, sec. 14; *Thompson* v. *State*, 16 Ind. 516.) The judgment for costs can only be enforced and collected in the same manner "as costs in civil cases," that is, by execution.

It is claimed that the court exceeded its jurisdiction in rendering judgment for the costs, because no cost bill was regularly made out and filed, and because "a large proportion of the amount adjudged as costs * * * was for fees not allowed by law."

Although it would be a proper, and perhaps the better, practice to require the prosecution to make out a regular cost bill, in the same manner as is provided in civil cases, yet there is no provision of the criminal practice act requiring such a course to be pursued, and, in the absence of any statute regulating this matter, we think the court would have the right to determine the amount of costs, as it seems to have done in this case, from an examination of the fees charged by the respective officers.

The petition sets out, in detail, the fees allowed to the several officers which are claimed to be illegal. It does not appear that any motion was made in the court below to correct any of these alleged irregularities. We are of opinion that these questions can not be reviewed upon certiorari.

The question of the imposition of costs and the amount to be allowed was a proper matter for the court to consider. It had jurisdiction to determine what items of costs should be taxed. If any error was made it could have been remedied by a proper motion in the district court. Relator was entitled to have his day in court and to make any objections to the judgment for costs, or to the allowance of any illegal fees. The fact that no cost bill was regularly filed did not deprive him of that right. If the court erred in allowing any costs that were not taxable against the relator, it was not an excess of jurisdiction, and its action, in this respect, can not be reviewed upon certiorari. (*In re* Wixom, 12 Nev. 219, and authorities there cited; *Petty* v. *County Court*, 45 Cal. 246.)

The writ must be dismissed. It is so ordered.

[No. 1,049.]

THE STATE OF NEVADA, RESPONDENT, *v.* THOMAS PARKER, APPELLANT.

CERTIFICATE OF INCORPORATION—NOT READ TO THE JURY.—A certificate of incorporation of the C. P. R. R. Co., was admitted in evidence without objection. *Held*, that the defendant was not prejudiced because it was not read to the jury.

OWNERSHIP OF RAILROAD CAR—SUFFICIENCY OF PROOF TO SUPPORT INDICTMENT.—Testimony was given that the car, which the defendant was charged with burglariously entering, was upon the track of the C. P. R. R. Co., attached to its train, and in its possession, occupancy, and control: *Held*, that the ownership of the car was properly laid in the C. P. R. R. Co., although the legal title was in another.

SECTION 167, CR. PR. ACT, CONSTRUED—RECOGNIZANCE—ADMISSION OF DEPOSITION.—Section 167 of the criminal practice act, as amended in 1867, does not make the taking of a recognizance a condition precedent to the admission of the deposition.

SECTION 151 OF THE CR. PR. ACT CONSTRUED—WITNESS OUT OF STATE.—A deposition of a witness taken under section 151 of the criminal practice act, can not be used in evidence without proof that at the time of the trial the witness was "sick, out of the State, dead, or that his personal attendance could not be had in court."

IDEM—TESTIMONY.—Testimony stated and held insufficient to show that the witness, whose deposition had been taken, was out of the State, or that his personal attendance could not have been procured.

APPEAL from the District Court of the Seventh Judicial District, Elko County.

The facts are stated in the opinion.

J. H. Rand, for Appellant:

I. The court erred in admitting the deposition of Mercer, taken before the committing magistrate. (*Coleman* v. *State*, 58 N. Y. 555; *Rosenweig* v. *The People*, 63 Barb. 634; *Jones* v. *Planters' Bank*, 3 Hump. 78.)

II. The ownership of the goods was laid in A. W. Mercer, and it was incumbent on the prosecution to prove the ownership as laid. (1 Bishop Cr. Pro., 2d ed., 147, 512; 3 Greenl. Ev., secs. 10–13; *Wilburn* v. *State*, 41 Tex. 237.)

III. The introduction of such testimony under the circumstances assumed by the prosecution to have existed in this case is in derogation of common law. (3 Greenl. Ev.,

sec. 11; *Dominges* v. *State*, 7 S. & M. 475; 1 Bish. Cr. Pro., 2d ed., secs. 1092–1093; 1 Nev. 27; 25 Cal. 400.)

IV. There was no sufficient proof that the witness was examined in the presence of the defendant. (3 Greenl. Ev. sec. 11; 1 Bish. Cr. Pro. sec. 1093; Crim. Pr. Act, sec. 151).

V. There is no evidence that the magistrate required of the witness, Mercer, any surety for his appearance to testify at the trial of the cause. The intention of the statutes was to compel the attendance of the witness at the trial. The defendant had a right to presume that the magistrate would perform his duty and obey the plain mandate of the law.

VI. There was no sufficient evidence that the witness was absent from the state at the time of the trial, to justify the court in admitting the evidence.

VII. There was an absolute failure of proof to show that the case, entered by defendant, was the property of the Central Pacific railroad company. And the court should have given the instruction asked by the defendant, and refused by the court. (29 Cal. 257; 28 Ind. 321; 6 Nev. 175; 12 Id. 601; 2 Bish. Cr. Pro., sec. 137; 48 Cal. 551.)

M. A. Murphy, Attorney General, for Respondent:

I. The deposition was properly admitted. (1 Comp. L. 1779–1799.)

II. The testimony of Lane was sufficient to satisfy the court that the witness Mercer was without the state. (Eng. Com. L., vol. 3; 2 and 3 Stark. N. P. 379, star notes, 208, 209; 1 Greenl. Ev., sec. 163.)

By the Court, LEONARD, C. J.:

Appellant was convicted of the crime of burglary in entering, at Elko, a smoking-car of the Central Pacific railroad company, attached to an eastern-bound train of said company, with intent to commit petty larceny by burglariously and feloniously taking, stealing, and carrying away one overcoat, together with certain articles in the pockets thereof, the property of one A. W. Mercer, and of the value of twenty-five dollars. He appeals from the judgment.

Opinion of the Court—Leonard, C. J.

1. A certificate of the articles of incorporation of said Central Pacific railroad company was offered in evidence and admitted, to prove its corporate existence, but it was not read or exhibited to the jury; and it is claimed that, until read to the jury, there was no evidence upon which they could act, that the company was incorporated as charged in the indictment.

There is no complaint, nor was it objected at the trial, that the certificate was not what it purported to be, or that it was incompetent evidence of the fact sought to be proved thereby. It was admitted without objection. From its admission under such circumstances, the jury had a right to presume the instrument was what it purported to be—proof of the incorporation of the Central Pacific railroad company. Confessedly, then, there was ample evidence admitted upon this point to support the verdict and judgment, and there is none against it. We must, therefore, consider it as established that the company was, in fact and in law, a corporation.

Conceding, then, for the sake of the argument, that the certificate should have been read to the jury, still, the failure to do so, does not justify us in disturbing a judgment, which, upon this point, is fully supported by the facts. If there was an error it was one without prejudice to the defendant. If the certificate had been read, the verdict, so far as this question is concerned, ought to have been what it was.

2. There was sufficient evidence that the car was the property of the Central Pacific Railroad Company, as alleged in the indictment. It was upon the track of that company, attached to its eastern-bound train, and in its possession, occupancy, and control. Such being the facts, the ownership was properly laid in the Central Pacific Company, although the legal title was in another, which fact, however, from the testimony of Mr. Coddington, is at least improbable, although, on cross-examination, he was unable to testify positively on the subject, upon his own knowledge. (2 Bish. Crim. Proced., sec. 138; *Markham* v. *The State*, 25 Ga. 52.)

3. At the trial, a deposition of said A. W. Mercer, taken at appellant's preliminary examination, was offered and admitted in evidence, against the objections of his attorney, who now insists that such admission was error for many reasons. That Mercer's testimony was material, is not disputed. It was the only evidence in the case tending to prove the ownership of the property taken from the car by appellant, as alleged in the indictment. It was material for other reasons, which need not be stated.

We think the certificate of the justice shows that the witness was examined and cross-examined in the presence of appellant, and that it is otherwise sufficient to warrant the admission of the deposition under proper circumstances.

It is urged by counsel for appellant that it was error to admit the deposition, without showing that the witness, Mercer, entered into a written recognizance to appear and testify at the trial, as required by the statute (C. L. 1795), which provides, in substance that, "on holding the defendant to answer, the magistrate shall take from each of the material witnesses examined before him a written recognizance that he will appear and testify at the trial court, or that he will forfeit the sum which may be ordered by the court." In view of our conclusion upon one point of objection made by counsel, it becomes necessary to decide this question: Was it the intention of the legislature of 1867 to make the giving of a recognizance a condition precedent to an admission of the deposition, when the witness is sick, out of the state, dead, or when his personal attendance can not be had in court? (C. L. 1779.) No authorities are cited by either side, and so far as we are informed, the question is *res integra*.

In the criminal practice act of 1861 (sec. 167) the magistrate was required to take from each of the material witnesses examined before him, on behalf of the people, a written recognizance to appear and testify at the trial, or that he would forfeit the sum of five hundred dollars. (Stat. 1861, 453.) At that time the statute made no provision for the admission of depositions taken at preliminary examinations, nor was such provision made until 1867,

when section 151 was so amended (C. L. 1779) as to permit, under the circumstances therein stated, the admission of depositions at the trial. So it is evident that the legislature of 1861 did not intend what is now claimed by counsel for appellant, because by section 167 recognizances of the people's witnesses were required, while the use of their depositions at the trial was not permitted by statute. The intention at that time seems to have been, mainly at least, to insure the presence at the trial of the material witnesses for the prosecution. At the session of 1867 section 167 was amended so as to require the magistrate to take from each material witness *examined before him* a written recognizance to appear and testify at the trial, or that he would forfeit the sum which might be ordered by the court. The three sections which follow have never been amended, and with those preceding, they show to our minds that the legislative intent has always been the same—that is, to secure the attendance of witnesses required to give recognizances, as well after 1867, when depositions were admitted in certain cases, as before, when the statute did not provide for their admission in any event. We think the legislature of 1867 had but one object in amending section 167, which was to secure, or to aid in securing, the attendance of the defendant's witnesses as well as those for the state, and that it did not intend to make the taking of a recognizance a condition precedent to the admission of the deposition.

Section 151 (C. L. 1779) states the circumstances under which depositions may be used by either party at the trial, and we can not change them by adding conditions not stated, or subtracting those specified.

Should either party induce a witness not to appear at the trial, that fact proven would, probably, debar such party from the right to use the deposition, in case the witness is out of the state, or unable to attend, on account of the acts of that party; but we think of no other case where the deposition may not be used under the circumstances mentioned in section 151.

It is the duty of the magistrate to obey the statute in relation to the taking of recognizances of material witnesses,

and it is the same in respect to other requirements touching preliminary examinations. A defendant can, however, always protect himself if he sees fit, by having the depositions of his witnesses taken conditionally, under section 171; and as to the witnesses for the state, he has a right to cross-examine them fully at the preliminary examination.

Finally, it is claimed by appellant's counsel that the court erred in admitting Mercer's deposition because there was no proof that he was "sick, out of the state, dead, or that his personal attendance could not be had in court." We think this objection is well taken. The statute provides that, depositions taken upon preliminary examinations, reduced to writing and authenticated by the magistrate as therein required, "may be used by either party on the trial of the cause, * * * when the witness is sick, out of the state, or when his personal attendance can not be had in court." (C. L. 1779.)

It admits of no discussion that it was incumbent upon the state to show, by some proof at least, the existence of one of the conditions stated in the statute; for it is only when the witness is sick, etc., that the right to use the deposition is given. It is not shown whether Mercer was a resident of the state or not. So far as we know, he may have resided in the town of Elko, where the case was tried.

The only evidence given as a foundation for the introduction of the deposition in question, is as follows: John M. Lane, constable, said: "Saw a man in Elko on the evening of the fifth day of November, 1880, who said his name was A. W. Mercer. He went by the name of A. W. Mercer here. I heard him testify before the committing magistrate on the hearing upon this case. He had a ticket for Chicago; said he was going to Kankakee, Illinois. I saw him get on the cars going east on the evening of the sixth of November, 1880; have not seen him since." There was then no proof that the witness was sick, or dead, and we think there was nothing to show that he was out of the state, or that his personal attendance could not have been had in court. The cause was tried November 26, and he left Elko on the cars on the sixth of the same month. He had time enough,

and more, to go to Illinois and return, between the two dates mentioned. Besides, he may not have gone beyond the first station east of Elko. He may not have intended, in fact, to leave the state. So far as we know, no effort was made to find him or produce him in court. No subpœna was issued for him. So we say again, there was absolutely no proof that he was out of the state, or that his personal attendance could not have been had in court. For the error in admitting the deposition without proof of some one of the conditions stated in section 151, the judgment must be reversed and the cause remanded for a new trial.

It is so ordered.

[No. 1,032.]

A. H. MANNING, SURVIVING PARTNER OF THE LATE FIRM OF MANNING & DUCK, APPELLANT, *v.* M. J. SMITH, RESPONDENT.

ACTION BY SURVIVING PARTNER ON PROMISSORY NOTE EXECUTED IN FIRM NAME AFTER DEATH OF A PARTNER—SUFFICIENCY OF COMPLAINT.—The allegations of complaint stated in the opinion and held equivalent to a positive averment that the note was made and delivered to the plaintiff, as surviving partner, in the name of the firm, and to be sufficient to enable plaintiff to maintain the action.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

Webster & Rankin, for Appellant:

The demurrer to plaintiff's amended complaint was improperly sustained. On the death of one partner the surviving partner is entitled to all the choses in action and other evidences of debt belonging to the firm. They must be collected in his name. The right of action in relation to all partnership demands is transferred to the surviving partner. (Collyer on Part., sec. 666, note 5; *Murray* v. *Mumford*, 6 Cow. 441; *Burney* v. *Smith*, 4 Har. & J. (Md.) 485; *Yale* v. *Eames*, 1 Metc. 487.) The execution of the note sued on

after the death of Duck, in settlement of an account owing by Smith to the firm of M. & D., was not the making of a new contract, but simply the changing of the form of the indebtedness. (Collyer on Part., sec. 546, note; *Darling* v. *March*, 22 Me. 184; *Rootes* v. *Wellford*, 4 Munf. 215; *Woodford* v. *Dorwin*, 3 Vt. 522.) This does not prevent the surviving partner from suing upon it in his own name. Manning, as surviving partner, is the real party in interest. It is not necessary that the payee mentioned in the note is the real payee, if the court can ascertain who the real payee is. (1 Daniels on Neg. Inst., secs. 99, 100, and cases cited.)

W. M. Boardman, for Respondent:

I. The court did not err in sustaining defendant's demurrer to plaintiff's original complaint. It is not alleged in said complaint that any member of said firm is deceased. (1 Estee's Pl. 259; Collyer on Part., secs. 674, 675, 650, 651.) It is not shown that the plaintiff is the surviving partner, and as such, entitled to maintain this suit. (*Hubbell* v. *Skiles*, 16 Ind. 138; *Ledden* v. *Colby*, 14 N. H. 33.) The complaint discloses on its face that the note sued on was not made or delivered to the plaintiff as surviving partner. (*Keith* v. *Pratt*, 5 Ark. 661.)

II. The court did not err in sustaining defendant's demurrer to plaintiff's amended complaint. Upon the death of one of the members of said firm, September 19, 1878, the same was then dissolved. The firm of Manning & Duck being dissolved, then and thereafter ceased to be a person in law; new contracts or promissory notes could not be taken or made to such firm; the note sued on was not made or delivered to any person or payee in law, and is void. (*Cornthwaite* v. *Bank of Rockville*, 57 Ind. 268; Collyer on Part., secs. 540, 541; Story on Con., sec. 241; 1 Pars. on Con. 201; *Wayman* v. *Torreyson*, 4 Nev. 124.) The note was not the property of said firm, upon which any right of action exists in favor of plaintiff as surviving partner; but, if any right of action exists in favor of such plaintiff, it is upon the original demand of the firm. (*Daby* v. *Ericsson*, 45 N. Y. 786; *Clark* v. *Howe*, 23 Me. 560.) The right of the surviving

partner was to continue in possession of the effects of the copartnership, and to settle its business, but his right and power do not extend further. No obligation to pay money can be made to the members of a firm when one of its members is dead, or to the firm, when the firm itself is dissolved. (Comp. L., p. 173, sec. 200; Coll. on Part., sec. 129, pp. 124, 125, and cases cited; Id., sec. 130, pp. 126, 127; *Gleason* v. *White*, 34 Cal. 258.)

By the Court, HAWLEY, J.:

This action was brought upon a promissory note executed by the defendant to "Manning & Duck," on the first day of January, 1879. The district court sustained a demurrer to the original and amended complaint, and (the plaintiff refusing to further amend) entered judgment in favor of defendant. The original complaint did not contain any averment as to who constituted the firm of Manning & Duck; nor did it allege that any member thereof was dead. It failed to show the essential facts necessary to authorize the plaintiff to maintain the action as "surviving partner of the late firm of Manning & Duck."

The amended complaint alleges: "That prior to the nineteenth day of September, 1878, A. H. Manning and William Duck constituted a copartnership under the firm name and style of Manning & Duck; * * * that on the nineteenth day of September, 1878, said William Duck, one of the members of the said firm of Manning & Duck, died, leaving as sole surviving partner said A. H. Manning, in which capacity of surviving partner he brings this suit; that * * * on the first day of January, A. D. 1879, said M. J. Smith, defendant, in settlement of an account held by said firm against him, made, executed, and delivered, in the name of said defendant, his certain promissory note" (a copy of which is set out); "that the note is due and unpaid; that plaintiff, as surviving partner of the firm of Manning & Duck, is the holder of the note, it being the property of the late firm."

We are of opinion that these averments are sufficient to

enable the plaintiff to maintain this action. The allegations are not as clear and specific as they might have been made. They are, however, equivalent to a positive averment that the note was made *and delivered to the plaintiff, as surviving partner*, in the name of the firm.

From the facts stated, the law will infer that the contract was made with the living party alone. (*Bonne* v. *Ray*, 5 Ark. 20.)

The judgment of the district court is reversed and the cause remanded for trial. The district court will grant defendant a reasonable time within which to appear and answer the amended complaint.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

APRIL TERM, 1881.

[No. 1,045.]

THE STATE OF NEVADA, RESPONDENT, *v.* J. J. QUINN, APPELLANT.

ASSAULT—JURISDICTION OF SUPREME COURT ON APPEAL.—Defendant was indicted for the crime of an assault with intent to kill, and was tried and found "guilty of an assault." The judgment imposed a fine of five hundred dollars, and taxed the costs against defendant. From this judgment an appeal was taken. *Held*, that this court had no jurisdiction. Appeal dismissed. *State* v. *McCormick*, 14 Nev. 347, affirmed. (Belknap, J., dissenting.)

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

C. S. Varian, for Appellant.

M. A. Murphy, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

Appellant was indicted for the crime of an assault with intent to kill. He was tried, and found "guilty of an assault," and adjudged to pay a fine of five hundred dollars, and a judgment was also rendered against him for the costs.

(*State ex rel. Quinn* v. *District Court, ante*, 76.) From this judgment an appeal is taken. The Attorney General moves to dismiss the appeal on the ground that this court has no jurisdiction. The principles involved in this case are the same as were presented and decided in the *State* v. *McCormick*, 14 Nev. 348.

Upon the authority of that case the appeal must be dismissed. It is so ordered.

LEONARD, C. J., concurring:

Every person accused of a crime must be charged with that crime; but an indictment charging an offense of a higher grade, as assault with intent to kill, also charges, by operation of law, every less offense that may be included under the charge of assault with intent to kill. (*People* v. *Apgar*, 35 Cal. 391.) This conclusion necessarily follows, also, from the statute, because the indictment "must be direct and contain * * * the offense charged" (statute 1867, 126), and "in all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment." (Stats. 1861, 479, sec. 412.) It follows, then, that a person charged in the indictment with assault with intent to kill, is also charged with simple assault.

If he is convicted of simple assault, he is acquitted of all offenses of a higher grade, and stands charged and convicted of the lower offense alone, which amounts to a misdemeanor only. I adhere, therefore, to the conclusion arrived at in *State* v. *McCormick*, 14 Nev. 348, and concur in the opinion of Mr. Justice Hawley.

BELKNAP, J., dissenting:

Appellant having been indicted for a felony and convicted of a misdemeanor, the question arises whether this court has jurisdiction of the appeal. Jurisdiction in criminal cases is conferred by the constitution in the following language: "The supreme court shall have appellate jurisdiction * * * in all criminal cases in which the offense charged amounts to felony." (Art. 6, sec. 4.)

In the consideration of this clause effect must be given

to the words used, and these words must be taken in their natural and well-understood sense. The word "charged," as here used, has a well-understood meaning, and refers to the indictment found. It can not refer to the judgment, for that does not embody the charge, but rather the conviction of the defendant. The intention of the constitution, as I understand it, was to give the supreme court jurisdiction in cases depending upon the importance of the charge and of the questions involved, rather than upon the result of the trial or the extent of the punishment imposed.

But whatever may have been the intention of the framers of the constitution, the clause conferring jurisdiction does not admit of judicial construction. It should be taken according to the ordinary signification of the plain language used, and, so taken, I am of opinion that the court has jurisdiction of this case.

For these reasons I dissent from the judgment of the court.

[No. 1,054.]

JULIUS BAUM ET AL., APPELLANTS, *v.* MOSES MEYER ET AL., RESPONDENTS.

STATEMENT ON APPEAL—WHEN NOT CONSIDERED.—Where it is not shown that the statement on appeal was filed with the clerk, or that a copy of it was served, or that it was agreed to, or settled by the judge: *Held*, that it did not comply with any of the requirements of the statute and could not be considered.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

Joseph Napthaly, D. Freidenrich, and Wal. J. Tuska, for Appellants.

Lewis & Deal, for Respondents.

By the COURT, BELKNAP, J.:

It is not shown that the document purporting to be a statement on appeal was filed with the clerk of the district

Points decided.

court, or that a copy of it was served upon the opposite party, or that it was agreed to by the parties, or settled by the district judge. For these reasons respondent objects to its being considered a statement on appeal.

The statute regulating appeals at section 1388 (Comp. L.) provides: "A judgment or order in a civil action * * * may be reviewed as prescribed by this title, and not otherwise." Section 1393 provides: "When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement, * * * and shall file the same with the clerk, and serve a copy thereof upon the adverse party." The statement must thereafter be presented to the judge for settlement.

The subsequent section provides: "If the party shall omit to make a statement within the time limited he shall be deemed to have waived his right thereto." It is apparent that the pretended statement does not comply with any of the statutory requirements, and that by the terms of section 1388 it can not properly be considered. (*Corbett* v. *Job*, 5 Nev. 201; *Irwin* v. *Samson*, 10 Id. 232.)

Disregarding it, our examination is limited to the judgment-roll, in which no error appears or is assigned.

Judgment affirmed.

[No. 1,066.]

THE STATE OF NEVADA, EX REL. J. P. FLANNINGHAM, *v.* BOARD OF COUNTY COMMISSIONERS OF STOREY COUNTY, RESPONDENT.

SECTION 17 OF SALARY ACT (STAT. 1879, 136) CONSTRUED—SALARY OF JUSTICE OF THE PEACE.—*Held*, that under section 17 of the salary act the right of every justice of the peace, elected or appointed after the act took effect, to salary or fees, should be determined by reference to the number of legal votes cast at the last general election preceding the time when the claim for his salary is preferred.

APPLICATION for writ of mandamus.

The facts are stated in the opinion.

Lewis & Deal, for Relator.

Ogden Hiles, District Attorney of Storey county, for Respondent.

By the Court, HAWLEY, J.:

Relator was elected justice of the peace for township No. 3, in Storey county, at the general election held on the second day of November, A. D. 1880, and claims that he is entitled to a salary of three hundred dollars per month under the provisions of section 17 of the "act fixing the salaries of the various county officers." (Stats. 1879, 136.) His petition shows that at the general election held November 4, 1878, there were cast in said precinct one thousand five hundred and three votes, and at the general election of 1880 one thousand one hundred and fourteen votes.

The first section of the act provides that "from and after the first Monday in January, 1881, the following-named officers of the several counties in this state shall receive the following annual salaries, which shall be in full for all services and all *ex officio* services required of them."

Section 17 reads as follows: "Every justice of the peace, in any township in this state, wherein the number of legal votes cast at the last general election equals or exceeds the number of one thousand five hundred, shall receive as salary the sum of three thousand six hundred dollars per annum. * * *" Relator claims that the words "last general election" refer to the general election held in 1878, which was the last general election with reference to the time when the act was passed and approved. Respondent contends that the words refer to the last general election preceding the time when the justice assumed the duties of the office.

What was the intention of the legislature? Looking at the whole act, its object, scope, and extent, and especially to the benefits that it was evidently supposed the public were to receive therefrom, we think it is clear that the leg-

islature did not intend to make the votes cast at the general election of 1878 a test for determining the right of every justice of the peace to the salary provided for by section 17.

We are of opinion that it was the intention of the legislature that the right of every justice of the peace elected or appointed after the act took effect should be determined by reference to the number of legal votes cast at the last general election preceding the time when the claim for his salary is preferred. The petition does not state facts sufficient to entitle relator to the salary.

His application for the writ of mandamus is denied.

[No. 1,048.]

M. C. LAKE, APPELLANT, *v.* J. C. LEWIS, RESPONDENT.

SPECIFIC PERFORMANCE OF CONTRACT—FAILURE TO MAKE PAYMENTS—WHEN TIME IS NOT OF THE ESSENCE OF THE CONTRACT.—Where no time is specified in the contract for the payment of the purchase money, and no penalty is imposed for default of payment, and the purchaser is allowed to enter into the possession and improve the property, and the grantor afterwards accepts the purchase money: *Held*, that the acceptance of the money was a waiver of any default in payment, and that the purchaser was entitled to a deed.

IDEM—PRESUMPTIONS WHERE FINDINGS ARE SILENT.—Where the findings are silent upon the question of the time of payment, or the effect of failure to make prompt payment, or of delays or defaults of vendor or vendee, it will be presumed that time was not of the essence of the contract. In such a case it will not be held that a failure to make prompt payment created a forfeiture of the purchaser's rights.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

R. M. Clarke, for Appellant:

I. Lake having the legal title, the defendant having failed to pay and having set up both payment and adverse possession, Lake was entitled to recover possession of the premises in this action of ejectment. (Tyler on Eject. 46; *Paige*

v. *Cole*, 6 Iowa, 153; *Evans* v. *Lee*, 12 Nev. 393, 399; Story's Eq. Jur., sec. 761; Willard's Eq. Jur. 285.)

II. Lewis' occupancy was not adverse, but was subordinate and in privity with Lake. To constitute a bar, Lewis' possession should have been both adverse and under claim of title. (Tyler on Eject. 859, 860, 861, and cases cited, 874-878; *Jackson* v. *Bard*, 4 Johns. 231; *Jackson* v. *Johnson*, 5 Cow. 74.)

C. S. Varian, for Respondent:

I. It may be doubted whether ejectment lies at the suit of the vendor to recover the premises. (1 Sug. Vend. 276; Hill. on Rem. for Torts, sec. 23; *Arguello* v. *Edinger*, 10 Cal. 150.) The remedy by ejectment to enforce payment of the purchase price, is always conditional; that is, the judgment rendered is conditional upon the non-payment by the defendant in the action of the money due. If he pays even after judgment, he satisfies the record, and the plaintiff is only entitled to his costs. (*Hamm* v. *Beaver*, 31 Pa. St. 58; *Chadrick* v. *Felt*, 35 Id. 305; *Lauer* v. *Lee*, 42 Id. 165; *Taylor* v. *Abbott*, 41 Id. 352; *Hill* v. *Oliphant*, Id. 364; *Cadwallader* v. *Berkheiser*, 32 Id. 43; *Waters* v. *Waters*, Id. 307.)

II. If the plaintiff can recover the premises, it must be upon the theory that he rescinds the contract of sale. A party rescinding must put the opposite party *in statu quo*. (*Hunt* v. *Silk*, 5 East, 449; *Richardson* v. *Kuhn*, 6 Watts, 299; *Willis* v. *Wozencraft*, 22 Cal. 607.)

By the Court, BELKNAP, J.:

This is an action of ejectment to recover the possession of town lots in Reno. The defendant, in his answer, sets forth, among other defenses, that during the month of December, 1868, and when the plaintiff was the owner of the premises in controversy, he sold a portion thereof unto one W. C. Lewis, and thereupon let him into possession; that under the terms of the sale the purchaser was not entitled to a deed of conveyance of the premises until the payment of the purchase money, and that this money, amounting to the sum of seventy-five dollars, was paid during the month

of June, 1875. In the mean time, and during the year 1871, the defendant purchased from W. C. Lewis that portion of the premises theretofore purchased by him from plaintiff, and entered into possession thereof. A sale of a similar nature made by plaintiff directly to defendant in the year 1869, of the remaining portion of the lots, is also set forth. It is further alleged that upon entering into possession defendant and his grantor, upon the faith of these sales, made permanent improvements of the aggregate value of three thousand dollars upon all of the lots, and that plaintiff has refused to make a deed of conveyance of the premises to either W. C. Lewis or the defendant. The answer asks that plaintiff be required to make such conveyance to defendant in his own right, and as the successor in interest of W. C. Lewis.

The case was tried before a jury, by whom the facts touching the alleged sales were found substantially as claimed by defendant, save that he had not paid the purchase price of that portion of the premises purchased by himself directly from the plaintiff. Thereupon the court adjudged that defendant pay unto plaintiff, within thirty days, the purchase money found due, to wit, the sum of three hundred and eleven dollars, and that within five days thereafter plaintiff deliver unto defendant a deed of conveyance of the premises. From this judgment and decree plaintiff has appealed.

The point to which our attention is called as ground for reversal of the judgment is, that the legal title being in plaintiff, and defendant having failed to pay the purchase money, and having pleaded payment and adverse possession, plaintiff was entitled to have recovered in this action.

It is well settled that under our system of practice a party may set up in defense to an action at law whatever legal or equitable defenses he may have. The equitable title of defendant as pleaded was sufficient to have defeated a recovery, and to have entitled him to a specific performance of the contract. He failed, however, to establish payment of the purchase money, and it becomes necessary for us to consider the effect of such failure.

There is no doubt that in equity time may be made of the essence of the contract, either by express stipulation or when it necessarily follows from the nature and circumstances of the contract. The authorities in this country generally hold that courts of equity will in no case consider it immaterial. (1 Story Eq. Jur., sec. 776; *Scott* v. *Fields*, 7 Ohio, 431.) But the facts of each case must determine whether the parties have or have not made time of the essence of the contract.

In looking at the facts of the case under consideration as appears from the findings of the jury (for the evidence is not brought up), it would seem that time was not made of the essence of either of these contracts. We reach this conclusion in reference to the contract entered into with W. C. Lewis, because it is not shown that any time was specified for the payment of the purchase money, or that any penalty was to have been imposed for default in payment. On the contrary, he entered into possession and permanently improved the property with the presumed approbation of the plaintiff, and in the year 1875 the plaintiff accepted the purchase money from him. The acceptance of this money was of itself a waiver by plaintiff of any default in payment.

In regard to the contract of sale between plaintiff and defendant, the fact that defendant was at the time of the purchase engaged in the business of printing, and that the purchase price was to have been paid either in printing or money, tends to prove that no definite time for payment was fixed.

But without pursuing this subject further, it is sufficient to say that as the findings are silent upon the question of the time of payment, or the effect of failure to make prompt payment, or of delays or defaults of vendor or vendee, we must conclude that time was not of the essence of the contract. We can not hold that a failure to make prompt payment of itself created a forfeiture of defendant's rights under the contract.

In *Brashier* v. *Gratz*, 6 Wheat. 528, the supreme court of the United States, in considering this subject, said: "The

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rule that time is not of the essence of a contract has certainly been recognized in courts of equity; and there can be no doubt that a failure on the part of a purchaser or vendor to perform his contract on the stipulated day does not, of itself, deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his engagement." But if circumstances are so changed that the object of the party can no longer be accomplished, and he can not be placed in the same situation as if the contract had been performed at the time stipulated, a court of equity will leave the parties to their remedy at law.

To the same effect is the case of *Longworth* v. *Taylor*, 1 McLean, 402: "To hold that the failure of the vendee to pay the purchase money for an hour or a day, should of itself authorize the vendor to rescind the contract, would disregard the distinction which has heretofore been made between the action of a court at law and chancery. * * * If the chancellor finds that the delay of payment has not operated injuriously to the vendor; that the condition of the parties is the same as when the payment should have been made; that the value of the property has not materially changed, and that the same justice can be done under the circumstances, as if the payment had been made at the time stipulated, chancery will not refuse its aid."

The finding of the jury to the effect that defendant's possession had been adverse, need not be considered, because it was disregarded by the court in its judgment and decree.

Judgment affirmed.

[No. 1,075.]

EX PARTE JOHN R. DARLING.

STATE PRISON ACT (STAT. 1881, 109) CONSTRUED—COMMUTATION OF PRISONER'S SENTENCE—UNCONSTITUTIONAL IN PART.—*Held*, that the act in question, in so far as it attempts to commute any portion of the sentence imposed by the courts prior to the time the act took effect, is inoperative and void, because it interferes with the judiciary.

HABEAS CORPUS, before the supreme court.

The facts are stated in the opinion.

No counsel for petitioner.

M. A. Murphy, Attorney General, for the state.

By the Court, HAWLEY, J.:

Petitioner is held in confinement in the state prison under a commitment, issued on the sixteenth day of November, 1872, ordering him to be imprisoned for the term of ten years. He claims that he is entitled to his discharge under the amended act "for the government of the state prison" (approved March 1, 1881), which provides that every convict faithfully performing such labor as may be required of him by the rules and regulations of the prison "shall be allowed from his term, instead and in lieu of the commutation heretofore allowed by law, a deduction of two months in each of the first two years, three months in each of the next two years, and four months in each of the remaining years of said term." (Stats. 1881, 109.)

The act is in terms retroactive. It was evidently intended by the legislature to apply to cases before, as well as after, the first day of April, 1881, when the act takes effect. This is made clear by the language of the *proviso:* "That of those prisoners entitled to their discharge *at the date of the passage of this act*, by virtue of the provisions hereof, not more than one shall be discharged on any one day." Is this portion of the act constitutional? Does it not interfere with the judiciary? The constitution divides the powers of the government of this state into three separate departments: the legislative, executive, and judicial. It declares, in clear and explicit terms, that "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." (Const., art. 3.)

The judicial power of this state is vested in the courts. The trial, conviction, and sentence of prisoners who have violated the laws of this state are well-known judicial du-

ties. Neither the legislative nor the executive department can interfere with the courts in the exercise of these or other duties which pertain exclusively to the judicial department.

Section 21 of article 5 of the constitution, creating a board of state prison commissioners, and giving to it "such supervision of all matters connected with the state prison as may be provided by law," does not *direct or permit* the legislature, under the pretense of regulating the discipline of the prison, to wipe out and destroy the previous sentences, or any portion thereof, imposed upon the prisoners by the courts. The legislature can only pass such acts as are authorized by the constitution. It can not infringe upon any of its provisions.

It may be admitted, for the sake of the argument, that the act was framed and beneficially designed to improve the discipline of the prison, and that it would, if allowed to be carried into effect, produce that happy result. If so, this argument might have had some force with the framers of the constitution had it then been presented; but it is not entitled to any weight with us if the constitution is, as we think it is, clear and explicit. We have only to deal with the question of power. We have nothing to do with the wisdom or expediency of the statute. We are of opinion that the act in question, in so far as it attempts to commute any portion of the sentence imposed by the courts prior to the time the act took effect, is inoperative and void, because it interferes with the judiciary.

A similar law was declared unconstitutional by the supreme court of Pennsylvania, and for the same reasons. The court, in passing upon this question, said: "The whole judicial power of the commonwealth is vested in courts. Not a fragment of it belongs to the legislature. The trial, conviction, and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. Can it be reversed or modified by a board of prison inspectors acting under legislative authority? If it can, what judicial decree is not exposed to legislative modifications? From

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what judicial sentence may not the legislature direct 'deductions' to be made if this act be constitutional? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?

"It is to be observed that these questions have no reference to the power of the legislature to prescribe a general rule of law that shall be inconsistent with a previous judicial decree. Such a rule, when it operates on future cases and not retrospectively, is quite legitimate. Their power to legislate in that manner is not to be doubted. But under the act in question the good conduct of a particular individual, under judicial sentence, is to work out for him an abatement of a part of his sentence. In respect to one of the relators who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment." (*Commonwealth* v. *Johnson*, 42 Pa. St. 448.)

The prisoner is remanded into custody.

BELKNAP, J., did not participate in this decision.

[No. 1,044.]

THE STATE OF NEVADA, RESPONDENT, *v.* JOHN T. PRITCHARD, APPELLANT.

DISCHARGE OF JUROR AFTER JURY IS SWORN—IMPANELMENT OF ANOTHER JUROR—FORMER JEOPARDY.—Where the incompetency of a juror was first made known to the court after the juror was sworn and the jury completed: *Held*, that, upon the facts stated in the opinion, the court was authorized to then discharge the juror, and to impanel another juror in his stead, and that these facts furnished no evidence to support defendant's plea of former jeopardy.

INCOMPETENCY OF JUROR—CONSCIENTIOUS SCRUPLES—CIRCUMSTANTIAL EVIDENCE.—A juror who states that he would not convict a defendant, in a capital case, on circumstantial evidence, is an incompetent juror.

DISCHARGE OF JUROR, NECESSITY FOR, AFTER JURY IS SWORN.—Courts are legally authorized to discharge a juror or a jury, after the jury has been sworn to try the case, whenever, from any cause, such a necessity exists as to make it apparent that the ends of justice would otherwise be defeated.

Argument for Appellant.

CHALLENGE TO JUROR—WHEN TAKEN—SECTION 334, CRIMINAL PRACTICE ACT, CONSTRUED.—Under the provisions of section 334 of the criminal practice act, whenever it appears from the examination of a juror, upon his *voir dire*, that he is disqualified, the challenge must be interposed before he is sworn; but these provisions have no application to a case where the disqualification or incompetency of the juror is not, without any fault of the challenging party, discovered until after the jury is completed.

DISCHARGE OF ONE JUROR NO NECESSITY FOR DISCHARGING JURY.—The discharge of an incompetent juror after the jury is sworn, does not create a necessity for the discharge of the eleven remaining competent jurors.

INSTRUCTIONS—PROVINCE OF JURY.—Where all the facts are agreed upon by counsel, and the only question is, whether, upon the agreed facts, the defendant had been in jeopardy: *Held*, that the court did not invade the province of the jury by giving an instruction, that there was no evidence to sustain a plea of former jeopardy.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

N. Söderberg, for Appellant:

I. The discharge of the juror Dorsey was a bar to a subsequent trial. Jeopardy attaches when the jury is complete and has been impaneled and sworn to try the cause. (Constitution of Nev., art. 1, sec. 8; 1 Comp. L. 1957, 1958, 2020, 2021; 1 Bish. Crim. L. 1013–1019; *Stewart* v. *State*, 15 Ohio St. 155; *Mounts* v. *State*, 14 Ohio, 295, 306; *Dobbins* v. *State*, Oh. St. 493; *Baker* v. *State*, 12 Id. 214; *Ward* v. *State*, 1 Humph. (Tenn.) 253; Cooley's Const. Lim. 327; 3 Ohio St. 238–241; 3 Co. Inst. 110; 7 Port. (Ala.) 207; *O'Brian* v. *Commonwealth*, 9 Bush (Ky.), 333; *People* v. *Hunckeler*, 48 Cal. 331; *McFadden* v. *Commonwealth*, 23 Pa. St. 12; 1 Whart. Crim. L. sec. 589; *Klock* v. *People*, 2 Park. Cr. R. 676, 685; *Queen* v. *Hepburn*, 7 Cranch, 297; *Commonwealth* v. *Tuck*, 20 Pick. 365; *People* v. *Barrett*, 2 Cai. 304; *King* v. *Sutton*, 8 Barn. & Cress. 417; *People* v. *Scoggins*, 37 Cal. 676, 680; *Gillespie* v. *State*, 8 Yerg. (Tenn.) 508; 2 Hawk. P. C. Ch. 47, 51; *State* v. *Rover*, 10 Nev. 388.)

II. In the absence of a statutory prohibition, such as exists in Nevada, against the withdrawal of a juror, after the jury is complete, the court may, perhaps, in cases of

necessity for causes occurring after the jury is sworn, at any time before verdict, put an end to the trial by discharging a number of the jury. But the inability of the state to convict defendant of the crime charged, does not constitute such necessity. Independently of the statute, therefore, the allowance of the challenge to Dorsey for implied bias, after the completion of the jury, was illegal, and entitled defendant to an immediate acquittal.

III. If Dorsey was not a qualified juryman, it was but cause of challege for implied bias, and could have been by the state or prisoner, and must have been made before the jury was sworn. The statute does not authorize either party to challenge a juror after the jury is complete. Discharging or breaking up a jury contrary to law, against his protest, without a verdict, is, in the law, an acquittal of defendant. (*People* v. *Scoggins*, 37 Cal. 676, 680; 1 Comp. L. 1957, 1958; *Mima Queen and Child* v. *Hepburn*, 7 Cranch, 290; 2 Com. Dig. 322, title "Challenge—Peremptory," letter C.)

IV. Had Dorsey remained on the jury, defendant would not have been entitled to a new trial by reason of Dorsey's conscientious scruples, no matter what verdict had been rendered. (*Jones' case*, 1 Leigh (Va.), 599; *Whitehead* v. *Wells*, 29 Ark. 99; *Woodward* v. *Dean*, 113 Mass. 297.)

V. Dorsey's unwillingness to find defendant guilty of murder in the first degree upon circumstantial evidence was no ground of challenge. It is not shown that the evidence relied upon by the prosecution was circumstantial, nor that defendant was guilty of murder in the first degree.

VI. There was no adjudication by the court upon the subject of the supposed necessity of discharging the juror Dorsey. Its judgment should have been expressed in some form upon the record. A discharge of a jury, without good cause shown on the record, operates as an acquittal. (*State* v. *Walker*, 26 Ind. 346; *Shaffer* v. *State*, 27 Id. 131; *State* v. *Redman*, 17 Iowa, 329; *State* v. *Vaughan*, 29 Id. 286; *People* v. *Cage*, 48 Cal. 323.)

VII. The court erred in overruling defendant's motion to discharge the eleven jurors remaining after Dorsey was ex-

cused. (1 Whart. Crim. L., sec. 589, and cases cited, note x; *Reid* v. *State*, 50 Ga. 556; 1 Bish. Crim. Pr., sec. 948.)

VIII. The jury should have been sworn to try defendant's plea of former acquittal. Until so sworn they were not qualified to try said plea. (*Lang* v. *State*, 58 Ala. 385.)

IX. The court erred in charging the jury to find for the people upon defendant's second plea, for this was charging the jury upon matters of fact. (Art. 6, sec. 12, Const.; *State* v. *Tickel*, 13 Nev. 502; *State* v. *Frazer*, 14 Id. 210; 1 Comp. L., sec. 931.)

M. A. Murphy, Attorney General, for Respondent:

I. Before a person accused of a felony can claim that he has been placed in jeopardy, he must show to the court that a jury of twelve good and lawful men had been selected and sworn; that they were free from any of the statutory disqualifications, and had been charged with the case.

II. Where a juror entertains such conscientious opinions as would preclude him from finding the defendant guilty where the punishment is death, it is the duty of the court, in the due administration of the law, to exclude the juror. (*Walters* v. *People*, 32 N.Y. 160; *Weller* v. *State*, 40 Ala. 331; *Gross* v. *State*, 2 Carter, 329; *Commonwealth* v. *Lesher*, 17 Serg. & R. 155; *Williams* v. *State*, 3 Kelly, 453; *Lewis* v. *State*, 9 Smed. & M. 115; *Martin* v. *State*, 16 Ohio, 364; *O'Brien* v. *People*, 36 N. Y. 276; *Greeley* v. *State*, 60 Ind. 141.)

III. A juror, who after he is sworn in chief and has taken his seat, is discovered to be incompetent to serve, may, in the exercise of a sound discretion, be set aside by the court. (13 Wend. 351; *People* v. *Wilson*, 3 Park. Crim. 199; *State* v. *Allen*, 46 Conn. 531.)

IV. Though neither party has a right of challenge after a juror is sworn, it is in the discretion of the court to protect the administration of justice by investigation, at any stage of the trial, on objection to the impartiality of a juror, and by withdrawing the case from the jury if any juror is found unfit to sit thereon. (*U. S.* v. *Morris*, 1 Curtis' C. C. 23.)

V. An alien will not be permitted to sit on a jury, and a

challenge can be interposed at any time before verdict. (*Stone* v. *People*, 2 Scam. 326; *Hill* v. *People*, 16 Mich. 351.)

VI. A member of the grand jury which found an indictment against the prisoner is not a competent juror, and either party may object to him acting as such at any time before the verdict is rendered. (*Dilworth* v. *Commonwealth*, 12 Gratt. 689; *Reg.* v. *Ward*, 10 Cox Cr. L. C. 573; *Watkins* v. *State*, 60 Ga. 601.)

VII. A juror who has formed or expressed an opinion is disqualified, and can be challenged off at any time before the verdict is rendered. (*State* v. *Tuller*, 34 Conn. 280.)

VIII. Where, in the course of a trial, the judge was informed that a juror had fraudulently procured himself to be selected for the purpose of acquitting the prisoner, and the juror was withdrawn: held, there was no jeopardy. (*State* v. *Bell*, 81 N. C. 591.)

IX. The prohibition in article 1, section 8, of the state constitution, that "no person shall be subject to be twice put in jeopardy for the same offense," means, that no person shall be tried the second time for the same offense after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction and judgment rendered thereon. (*Jones* v. *The Queen*, Crim. L. Mag., Nov. 1880, 766.)

X. The answers of the juror, Dorsey, were made in response to the questions of the defendant's counsel. This was a reopening of the question of the qualification of the jurors at the instance of the defendant, and was a waiver of their being sworn.

XI. The allowance of a challenge for implied bias is not the subject of an exception. (Crim. Pr. Act, sec. 241; *State* v. *Larkin*, 11 Nev. 325; *People* v. *Murphy*, 45 Cal. 142; *People* v. *Atherton*, 51 Id. 495; *People* v. *Vasquez*, 49 Id. 560; *People* v. *Cotta*, Id. 166.)

By the Court, HAWLEY, J.:

There is a growing conflict of the authorities in the United States as to the true meaning of constitutional provisions similar to ours that "no person shall be subject to

be twice put in jeopardy for the same offense." (Const., art. 1, sec. 8.) Some of the courts hold that it means no more than the common law plea of *autrefois acquit*, while others contend that it goes farther, and that jeopardy attaches when the jury is completed and sworn to try the case.

Upon the facts presented by this appeal we do not feel called upon to express our views upon this subject, although it has been elaborately argued by appellant's counsel. It may, and will, be admitted, for the purposes of this opinion, that jeopardy attaches when the jury is sworn to try the case. All the authorities which adhere to this view of the question admit, as has been decided in this state, that there are exceptions to the rule "based upon urgent necessity." (*State* v. *Rover*, 10 Nev. 398.) The only question, therefore, which we are asked to determine is, whether or not a necessity existed for the discharge of the juror Dorsey after the jury was complete and sworn to try the case, and whether it was proper for the court to impanel another juror in his stead.

The facts, as they appear of record, are as follows: "That on the twenty-third day of July, A. D. 1880, in the regular course of said trial of defendant, * * * twelve jurors had been duly examined upon their *voir dire*, accepted by plaintiff and defendant, and severally duly sworn * * * to well and truly try the matter in issue between the said state of Nevada and the said J. T. Pritchard, and a true verdict render therein according to the law and the evidence * * *; that the juror, J. C. Dorsey, had been carefully examined on his *voir dire* touching his qualifications to serve as a juror in said cause, and had stated on such examination that he was not opposed to capital punishment, and that he had, or entertained, no such conscientious scruples or opinions as would preclude him from finding a verdict of guilty in a case where the punishment would be death if the evidence warranted such verdict; that after said twelve jurors had been sworn to try said cause * * * and before any evidence had been introduced, * * * defendant's counsel, by leave of court, asked the said jury the

following question, to wit: 'Since you were examined by me before, touching your qualifications to serve as jurors, has anything happened, or occurred, to your recollections, to render you improper jurors in this case to your knowledge?' Whereupon the said juror Dorsey arose and said that he was unwilling to find a verdict of murder in the first degree on circumstantial evidence, and made the following statement: * * * 'I have this to say: It would take very strong evidence for me to bring in a verdict of conviction. Some of the jurors were asked on the same ground I take now. I was not asked; that is, I would hardly bring in a verdict of murder in the first degree unless it was very positive and personal evidence.'

"Question by Mr. Woodburn (of counsel for the prosecution)—Would you render a verdict of guilty upon circumstantial evidence alone, without any eye-witness being put upon the stand, as to the commission of the crime? Answer—No, sir.

"Ques.—Suppose there was no witness to the transaction, no person who saw the defendant shoot Humphrey Symons (and) take his life, and his guilt depended upon circumstantial evidence, would you render such a verdict, a verdict in the first degree, when you knew the penalty was death? Ans.—No, sir; I would not. I wasn't examined upon that subject before.

"Mr. Woodburn—We challenge him on the ground that he is opposed to capital punishment.

"The Court—You will be excused.

"Mr. Söderberg (counsel for defendant)—We object to his being excused, and except to the ruling of the court.

"The court overruled the objection, allowed the challenge, and excused the juror. * * * That no other reason existed for discharging said juror except the one hereinbefore stated. That neither plaintiff, defendant, or said juror had been guilty of any intentional fraud or deception in procuring the swearing of said jurors to try said cause, except so far as the answers made by the said juror on his *voir dire* may operate as such legal fraud."

After the juror Dorsey was excused, the court proceeded,

against the objection of defendant, to impanel another juror. Before such juror was impaneled defendant moved the court to discharge the remaining eleven jurors, who had been sworn to try said cause, upon the ground "that the withdrawal of said Dorsey operated as a destruction of said jury." The court denied the motion. After the juror Dorsey was discharged, the defendant interposed a special plea of former jeopardy. The court instructed the jury "that there was no evidence to sustain a verdict in favor of defendant upon his said special plea of former jeopardy." The defendant was convicted of murder in the second degree.

If the juror Dorsey had made the same statement before he was sworn as a juror, as he did afterwards, it would have been the duty of the court to have then and there discharged him. The statute, in clear and explicit terms, declares that any juror entertaining such conscientious opinions "shall neither be permitted nor compelled to serve as a juror." (Crim. Pr. Act, sec. 340; 1 Comp. L. 1964.)

If circumstantial evidence was introduced, and it was clearly sufficient to warrant a verdict of guilty, it would have been the duty of the juror to find such a verdict. He said, in effect, that he could not discharge his duty in this respect; that he would not find a verdict of guilty, where the death penalty might be enforced, in a case of circumstantial evidence, no matter how convincing and clear such testimony might be. He was an incompetent juror. His answers were very similar to those given by a juror in *The People* v. *Ah Chung*. In that case the court said: "It clearly appears from the examination of the juror that he would not convict, in a capital case, on circumstantial evidence; and we think that the challenge was properly sustained. There are many cases in which the evidence on the part of the prosecution is entirely circumstantial, and to hold that a party is a competent juror who will not convict on such evidence would in many cases defeat the ends of justice." (54 Cal. 402.) In the language of the supreme court of Illinois: "It would be but a mockery of justice to go through

the forms of a trial with such a person upon the jury." (*Gates* v. *People*, 14 Ill. 435.)

This brings us to the discussion of the vital question: Was the court authorized to discharge the juror, against the objection of the defendant, after the jury was sworn to try the case? In considering this question, it must continually be borne in mind, that Dorsey was, on account of his conscientious opinions, incompetent to serve as a juror; that his incompetency was not made known to the court, or counsel, until after he was sworn; that his incompetency was of such a character that it could not be waived; that it was unnecessary for the prosecution to interpose any challenge to the juror, and that the statute makes it the imperative duty of the court not to *permit* any such person to serve as a juror. It must be remembered that it was not the fault of the prosecution, nor of the court, that the incompetency of the juror was not discovered until after the jury was sworn, and that the knowledge of the juror's incompetency was brought out by the voluntary act of defendant's counsel.

In *Ex parte Maxwell* (11 Nev. 436) it was held, that sections 396 and 397 of the criminal practice act (1 Comp. L. 2020, 2021) should be construed with reference to the constitutional restriction in respect to second jeopardy, and that under these provisions the trial courts are invested with power, in the exercise of a sound legal discretion, to discharge a jury after the cause has been submitted to them, without the consent of the defendant, and without the discharge constituting a legal bar to a future trial, in all cases of manifest necessity, whether such necessity arises from some physical cause occurring during the trial or deliberation of the jury, or from the inability of the jury to agree upon a verdict; that this power is not one of absolute, uncontrolled discretion, but must be exercised in accordance with established legal rules, and is always subject to review by the appellate court.

In *O'Brian* v. *The Commonwealth*, the supreme court of Kentucky, in construing a similar statute, said: "It could not have been intended by the section *supra* (248) that the

power of the court to discharge a jury in cases of necessity is restricted to the causes enumerated in that section; if so, all other causes arising during the progress of the trial showing a clear and manifest necessity for the discharge of the jury must be disregarded. This section of the code, in our opinion, was not intended to define all the causes upon the happening of which this power could be exercised, but was only intended as an adoption of the legal rule, that a case of actual necessity must exist before a jury can be discharged." (9 Bush, 337.)

All the authorities agree "that where the jury has been discharged upon necessity the prisoner may again be put upon trial." (*State* v. *Nelson*, 26 Ind. 368.) But what shall be considered as constituting such a necessity as to justify courts in exercising this power is not so well settled. The power is one, as before stated, of judicial discretion to be exercised soundly, not arbitrarily, according to the peculiar facts and circumstances of each particular case.

The most common of the class denominated as physical necessities that have been held to justify the courts in discharging a jury, although it has been sworn, is where the presiding judge becomes so ill as to be unable to proceed with the trial (*Nugent* v. *State*, 4 Stew. & P. 72); or where a juror is prevented by sickness from attending court during the trial. (*U. S.* v. *Haskell*, 4 Wash. 402; *Hector* v. *State*, 2 Mo. 166; *State* v. *Curtis*, 5 Humph. 601; *Commonwealth* v. *Fells*, 9 Leigh, 613.)

There is another class of cases where the courts have been justified in discharging a jury upon what is termed *the necessity of doing justice*, which arises from the duty of the court to prevent the obstruction of justice by guarding its administration against all fraudulent practices, such as tampering with the jurors after they are sworn (Foster's Crown Law, 27; *State* v. *Wiseman*, 68 N. C. 203); or the fraudulent introduction into the panel of a perjured juror, who at the instance of the defendant has procured himself to be selected on the jury for the purpose of acquitting the prisoner. (*State* v. *Bell*, 81 N. C. 591.)

From an examination of the numerous authorities, bear-

ing more or less upon this subject, we think it may safely be announced, as a general rule, that courts are legally authorized to discharge a juror or a jury, after the jury has been sworn to try the case, whenever, from any cause, such a necessity exists as to make it apparent that the ends of justice would otherwise be defeated.

It is for this reason, as well as upon the ground of physical necessity, that courts have always acted in discharging a jury whenever it clearly appears that they are unable to agree upon a verdict. The general principle is well stated by the supreme court of Ohio in the case of *Dobbins* v. *State:* "It is the right of the state, and one of the most solemn and responsible of its duties, to punish crime; and it is the absolute right of any one accused of crime to demand 'a speedy public trial by an impartial jury,' and a verdict, declaring his guilt or innocence, according to the due course of law. The one is indispensably necessary to the safety of the community and the preservation of peace and order, and the other for the protection of the innocent, and to prevent the oppression which might otherwise be practiced by those having charge of state prosecutions. The problem has always been to preserve intact both of these important rights; and the object has been completely accomplished by holding the accused liable to answer until, in the regular course of judicial proceedings, the tribunal charged with the issue, without molestation or interference, has had the fullest and amplest opportunity to pass upon the question of his guilt; and by making every interference on the part of the government by which a verdict is prevented, while a reasonable hope remains that one may be rendered, an absolute bar to his further prosecution. If a verdict can not be obtained upon one trial, another may be lawfully had; and the unavoidable delay which ensues is the fault of no one. For the better protection of the accused, the law requires unanimity in the jury before a verdict can be rendered; but to allow, on the one hand, the ignorance, perversity, or even honest mistake of a single juror to paralyze the administration of justice, and turn loose upon the community the most dangerous offenders, or, on the other, to

allow the government to trifle with the constitutional safeguards of the accused, would equally subvert the foundation principles upon which the criminal code is administered." (14 Ohio St. 501.)

The supreme court of the United States, in discussing this question, said: "We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." (*United States* v. *Perez*, 9 Wheat. 580.) Applying this principle to the case in hand, we think the court was justified in discharging the juror Dorsey.

How can it, consistently, be said that no necessity existed for his discharge? He was, as we have already shown, an incompetent juror. By an inadventure upon his part he had kept from the court and counsel all knowledge of his incompetency until after the jury was sworn to try the case. This was in effect, although not so intended by the juror, a fraud upon the court, and it was its plain duty, when the facts came to its knowledge, to protect itself from the "honest mistake" of the juror, and not to allow the administration of justice to be defeated by keeping such a person upon the jury.

Let us suppose for a moment that in answer to the question of defendant's counsel the juror had said: "When I was asked whether I had ever expressed any unqualified opinion as to the guilt or innocence of the defendant, I did not fully understand the question, and hence answered it erroneously. The truth is that I have expressed the opinion that the defendant is guilty of murder, and ought to be hanged. I entertain this opinion now, and it is so firmly fixed in my mind that no evidence will remove it." Can there be any question as to what the court should do in such a case? No. It would be the duty of the court to immediately discharge the juror. Why? Because it would be a mere farce, a mockery of justice, to compel the defendant to be tried by any juror entertaining such an opinion. Now the

state, as we had occasion to declare in the *State* v. *McClear*, "has certain rights as well as the prisoner. The people need protection as well as the defendant who is accused of crime." (11 Nev. 61.) Hence, it necessarily follows that when it clearly appeared, to the satisfaction of the court, from the answers given by the juror, that he would not convict the defendant, however clear and convincing the proofs might be, if the same depended upon circumstantial evidence, it was equally the duty of the court, as in the case last supposed, to immediately discharge the juror, and for the same reason. The juror had rendered himself incompetent. His mind was not in such a condition as to enable him "well and truly to try," as his oath required him to do, "the matter in issue" between the state and the defendant, "and a true verdict render therein according to the law and the evidence."

The principle of the statute is, that any person entertaining such an opinion is unfit to be a juror in such a case, because his conscience will not permit him to find the defendant guilty when death will be the consequence of the verdict, however conclusive the evidence may be. Such a person is unfit; he has prejudiced the question; he has made up his verdict without hearing the evidence, and ought to be excluded upon common law principles. "It would be a solemn mockery to go through the forms of a trial with such a jury, or even with one such juror. The prisoner is sure to be acquitted, independent of the question of guilt or innocence. It would be a misnomer to call such a proceeding a trial." (*People* v. *Damon*, 13 Wend. 354.)

We have not overlooked the provisions of section 334 of the criminal practice act, which declares that the challenge to an individual juror "must be taken when the juror appears, and before he is sworn, but the court may for good cause permit it to be taken after the juror is sworn, and before the jury is completed." (1 Comp. L. 1958.)

The state, as well as the defendant, is required to interpose its challenges before the jury is completed. This provision of the statute must be complied with. Whenever it appears from the examination, upon his *voir dire*, that a

juror is disqualified by reason of the existence of any fact which is made a ground of challenge, the juror must be challenged as specified in the statute, otherwise the party, whether the state or the defendant, will be considered as having waived the right of challenge.

But it can not, with any sound reason, be urged that this provision of our statute has any application to a case, like the present one, where the disqualification or incompetency of the juror, although a ground of challenge, is not, without any fault of the challenging party, discovered until after the jury is completed.

In *State* v. *Tuller*, immediately after the jury had retired from the court-room to consider their verdict, and before the verdict was rendered, a member of the bar informed defendant's counsel that one of the jurors (not naming him) had, prior to the commencement of the trial, expressed to him the opinion that defendant was guilty of the crime charged against him. The attorney did not bring this fact to the notice of the court until after the rendition of the verdict, when he moved the court to arrest the judgment on the ground of the bias of the juror. This motion was reserved for the advice of the supreme court.

The supreme court, in deciding this motion, said that if the facts had been brought to the knowledge of the court before verdict, it "would have sent for the jury and taken the case from them without hesitation," and declared the rule to be that if counsel "knows of an objection to the panel before the verdict is rendered, and in time to prevent the verdict, and obtain a rehearing before another jury, and does not avail himself of the opportunity, he must be holden to a waiver of the objection. Otherwise he would be permitted to lie by and speculate upon the chances of a verdict, and that can not be tolerated." (34 Conn. 294.)

In *State* v. *Allen*, 46 Conn. 531, each of the jurors, before being accepted and sworn, was examined in behalf of the state and defendant as to his qualifications. Upon the second day of the trial, and after witnesses had been examined in behalf of the state, the counsel for the defendant stated to the court that they had been informed and be-

lieved that one of the jurors in the case was disqualified, for the reason that before being sworn as such juror he had expressed the opinion that the accused was guilty of the crime charged in the indictment, and asked the court to suspend the trial and hear such witnesses as they were prepared to offer to prove such disqualification. The court, upon hearing the evidence, found as a fact that the juror had, before he was sworn, expressed an opinion that the defendant was guilty of the crime of murder in the first degree, and thereupon declared that said juror was disqualified to sit as a juror upon the trial of the case. Counsel for defendant then asked for time in which to consider what course they would adopt. The court granted them until the next day, when they offered to waive the disqualification of the juror and proceed with the trial. The court refused to accept such waiver and discharged the jury. The supreme court held that the offer of defendant's counsel came too late; that "the court could not then be required to reinstate the discharged juror upon the panel," and sustained the action of the court in discharging the jury.

In *Steward* v. *The State* (15 Ohio St. 155), after the jury was regularly sworn, the opening statement of counsel made, and a witness had been sworn and placed upon the stand, one of the jurors arose and said that he was one of the grand jurors which found the indictment against the defendant. Whereupen the plaintiff's attorneys "asked defendant's attorneys what they intended to do. And, in answer, the defendant's attorneys asked the attorneys for the plaintiff what they intended to do. Thereupon the court inquired of the plaintiff's attorneys what they intended to do. To which they replied that they would like to have the court suggest what they had better do. The court then asked the defendant's attorneys what they intended to do, and defendant's attorneys replied that they intended to stand upon the defendant's rights, and could not, nor would not do anything, or take any course to waive the defendant's rights in any respect whatever." After some further legal skirmishing and delay, "the court then asked defendant's attorneys if they objected to proceeding with

the jury. They replied that they did. The court then discharged said jury." The action of the court was sustained upon the ground that the discharge of the jury was the necessary result of sustaining the objection interposed by the defendant himslf, and hence did not take place without his consent; but was an act done at his own instance, and would not therefore operate as an acquittal, nor bar a further prosecution.

In this connection we deem it proper to say, as a matter of practice, that we would have justified the court had it refused to allow defendant's counsel to ask the jurors the general question as to their qualifications after the jury was complete. Counsel should not, in our opinion, have been allowed to fish, out of season, for some point upon which to lay a foundation for an exception, without, at least, first baiting his hook in a proper manner. He should have been required, in advance, to show to the court, by affidavit or otherwise, that he had reason to believe, and did believe, that one, or more, of the jurors was disqualified or was incompetent to try the case upon some ground of which he was not aware at the time of the completion of the jury, and to state the facts upon which his belief was founded. We hesitated for some time, before writing this opinion, whether it would not be a sufficient reply to the argument of appellant's counsel, upon this branch of the case, to say that the discharge of the juror Dorsey was brought about by the voluntary and irregular act of defendant's counsel in asking a question that ought not, under the circumstances, to have been permitted by the court. But, owing to the earnestness of the arguments of the respective counsel, as well as the interest and importance of the issues presented, we deem it best to dispose of the question upon its merits. Especially, as from each and every legal standpoint that could reasonably be taken, the authorities sustain the action of the court in discharging the juror Dorsey.

But the question, in regard to which we at first entertained some doubt, and which is by no means as well settled, is, whether the court was justified in impaneling

another juror in the place of the juror Dorsey, instead of discharging the jury.

In considering the facts of this case, in connection with the authorities to which our attention has been called, we have arrived at the conclusion that this action of the court was correct. The remaining eleven jurors were competent. No objection was urged against them. They had been selected, agreed upon, and accepted in the mode provided by law. No testimony had been offered. It seems to us that the discharge of an incompetent juror did not create a necessity for the discharge of the eleven remaining competent jurors.

In *People* v. *Damon, supra,* which was a trial for murder, after the fourth juror had been sworn in chief, and taken his seat, the district attorney inquired of him whether he had conscientious opinions against finding a verdict of guilty for an offense punishable with death. The counsel for the prisoner objected that the inquiry was too late; that after the juror was sworn in chief he could not be objected to. Upon this branch of the case the supreme court said: "The regular practice is to challenge jurors as they come to the book to be sworn, and before they are sworn; but I apprehend this is matter of practice, and may be departed from in the discretion of the court. The object is to give the prisoner a fair trial; and if it be made to appear, even after a juror is sworn, that he is totally incompetent by reason of having prejudged the case, it is not then too late to set him aside and call another. * * * Hawkins intimates there are authorities the other way; but I apprehend no authority can be necessary to sustain the proposition, that the court may and should, in its discretion, set aside all persons who are incompetent jurors, *at any time before evidence is given.*" (To the same effect see *Dilworth* v. *The Commonwealth,* 12 Gratt. 689; *Lewis* v. *The State,* 9 S. & M. 119.)

In *People* v. *Wilson,* 3 Park. Crim. R. 202, after several of the jurors had been challenged and set aside, and one had been sworn, a juror named Haight was called, and was challenged by the prosecution on the ground that he was opposed to capital punishment, and could not conscien-

tiously convict any one on the charge of murder. The court, after hearing the testimony, decided adversely to the challenge, and Haight was sworn and took his seat. After another juror had been sworn, and several others set aside, Haight addressed the court, and said that he had misunderstood the question previously propounded to him; that he had given a wrong answer; that he desired to correct himself and say "that he could not under any circumstances convict one on a charge for murder." The district attorney moved that the juror should be set aside. This motion was opposed by the prisoner's counsel. The court, in passing upon this question, said: "The position is a novel one, but it does not, I think, present an insurmountable difficulty. It was correctly held in the case of *The People* v. *Damon* (13 Wend. 351), that a juror who, after he is sworn in chief and has taken his seat, is deemed to be incompetent to serve, may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given, and that this may be done even in a capital case, and as well for cause existing before as after the juror was sworn. In that case, however, the juror had not been previously challenged; whereas in that now before us a challenge had been interposed, and a trial has been had, and the juror has been found by the court to be competent. So long as that finding stands, the juror can not be discharged; and yet it would be a mere mockery of justice to suffer the trial to proceed under such circumstances, and with such a juror. The maxim that 'what necessity compels, it justifies,' must, I think, apply in such a novel case. Our decision that the juror was competent must be vacated; the challenge to him must be opened, and the trial of it must be resumed. This was done; the juror repeated his last statement, and the court pronounced the challenge true, and the juror was set aside."

In some of these cases the juror was set aside before the jury was complete, in which respect they differ from the case at bar; but the principles announced tend to support the conclusions we have reached.

In *Stone* v. *The People*, after the jury was sworn, and after

three witnesses had been examined by the prosecution, it was discovered that one of the jurors was an alien. This juror was discharged and another called and impaneled in his stead. There is a statute in the state of Illinois authorizing the courts, in case a juror was, for any reasonable cause, discharged, "to cause others, if necessary, to be summoned and sworn in his or their stead." But the case was decided, and the remarks which we quote were made, upon general principles that are, in our opinion, directly applicable to this case and are correct. The court said: "The rule, at common law, undoubtedly is, where a juror is withdrawn by reason of sickness or any other cause, or where the death of any one ensues during the trial, the remaining jurors are to be discharged, and the prisoner, unless he consents to have the eleven remain, must be tried by another jury. And why is it so? Because the jury has been complete; the whole twelve were competent and qualified jurors. In the cases cited the remaining eleven jurors have been discharged, because one of the competent parts of the jury has been unable to perform its functions, not by any act of the parties, or of the court, but by physical causes beyond the control of both. Not so in the present case. For want of sufficient caution, an error has occurred. Now, shall it be said the court possessed no power to correct the error without prejudice to either party, but that in correcting it another shall be committed? Not so. Why is a court, for the ends of justice, and where manifest necessity exists for the act, authorized to discharge a jury? And if a whole jury may in such case be discharged, why not set aside a person improperly selected and sworn? No injustice has been done; no law has been violated. The rights of the prisoner have not been infringed; the course is agreeable to justice, and we can perceive no wrong in the course adopted." (2 Scam. 337.)

It necessarily follows from the views we have expressed, that the court did not err in instructing the jury that there was no evidence to sustain a verdict in favor of defendant upon his plea of former jeopardy. The instruction did not invade the province of the jury in deciding the facts of the

Points decided.

case. All the facts were agreed upon and stipulated by counsel, and the only question was whether, upon the agreed facts, the defendant had been in jeopardy. The instruction was correct.

We do not believe that any of the evil results suggested by appellant's counsel will ever flow from the effect of this decision. We are not unmindful of the rights of persons accused of crime, and have never hesitated, as the records of this court will show, to interfere in their behalf whenever any of their substantial rights have been infringed upon; but we are unable to see how this decision can ever be used to oppress or injure them or the state. We believe that it is in harmony with nearly all of the modern decisions, and that it accords with the letter and spirit of the criminal practice in this and other states, which has, as is expressed by the supreme court of Iowa (*State* v. *Roth*, 17 Iowa, 336), "sought to prevent persons convicted of crime from escaping deserved punishment on refined subtleties and black-letter precedents where no substantial interest or right has been prejudiced."

We are of opinion that the record shows "good cause" for the action of the court; that the jurors were properly sworn to try all the issues raised in this case, and that the defendant is not entitled to be discharged or to have a new trial.

The judgment of the district court is affirmed.

[No. 1,060.]

THE STATE OF NEVADA, RESPONDENT, *v.* B. H. CARRICK, APPELLANT.

EMBEZZLEMENT—COUNTY TREASURER—SUFFICIENCY OF INDICTMENT—PROOF. In an indictment against a county treasurer for embezzlement, it is sufficient to allege and prove the felonious conversion to his own use of any money that came into his possession, or was under his control by virtue of his office, without specifying with certainty the particular kind of funds embezzled, or the particular time when the money was received.

CHALLENGE TO JUROR—OPINION UPON FACTS—WHEN NOT DISQUALIFIED.—A juror stated that he had an unqualified opinion that there was a deficiency in the accounts of the defendant, as county treasurer, but had no

opinion as to defendant's guilt or innocence: *Held*, that a challenge to the juror, for implied bias, was properly disallowed.

CONFESSIONS—WHEN ADMISSIBLE.—A statement made by defendant to two of his bondsmen, that he was short in his accounts, at a time when he was not charged with crime, or under arrest, when no proceedings were threatened or any promise made to shield him from a criminal prosecution: *Held*, admissible in evidence.

IDEM—WHEN NOT ADMISSIBLE.—It is only in cases where the confession is obtained by mob violence, or by threats of harm, or promises of favor, or worldly advantage held out by some person in authority, or standing in such intimate relation that the law will presume that his promises or threats will be likely to exercise such an influence over the mind of the accused as to induce him to state things that are not true, that will authorize the courts to exclude the confession or admission.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

R. H. Taylor and *W. H. Dickson*, for Appellant:

I. The indictment contains no sufficient description of the moneys alleged to have been embezzled. (2 Bish. Crim. Pr., secs. 703, 704; 2 Bish. Crim. Law, sec. 374; *Rex* v. *Tyers*, Russ. & Ry. 402; *Rex* v. *Flower*, 5 Barn. & Cress. 736; *Rex* v. *Furneaux*, Russ. & Ry. 335; *State* v. *Murphy*, 6 Ala. 845; *People* v. *Cox*, 40 Cal. 275; *State* v. *Kroeger*, 47 Mo. 530; *State* v. *Stimson*, 4 Zab. 9.)

II. The evidence should have established an embezzlement of some sum of money, received by defendant at some one time, or which was shown by the evidence to have been under his custody or control at some particular time. Evidence of a general deficiency simply is not sufficient. (2 Bish. Crim. L., sec. 375 *et seq.*; 2 Bish. Crim. Pro., sec. 336; 2 Russ. Crimes, 167, 168, 181, 182, 183; Archb. Crim. Pr., 1353, 1354, 1356, 1357; *Brierly* v. *Cripps*, 7 Car. & P. 709; *Colby* v. *Hunter*, 3 Id. 7, note a; *Rex* v. *Hamilton*, 8 Id. 49; *Watkins* v. *Morgan*, 6 Id. 661; 2 Russ. on Crimes, 460, note z.)

III. The juror Coyne having formed an unqualified opinion to the effect that there was a deficiency in the accounts of defendant as treasurer, the challenge by defendant should have been allowed. (Proffatt on Jury Trials, secs. 166,

181; *Gray* v. *People*, 26 Ill. 344; *Arnold* v. *The State*, vol. 2, No. 5, "The Reporter," 175.)

IV. The confession of defendant made to Smith was inadmissible. (*Commonwealth* v. *Elwell*, 1 Gray, 463; *People* v. *McMahon*, 15 N. Y. 384; *People* v. *Wentz*, 37 Id. 303; *Teachout* v. *People*, 41 Id. 7; *State* v. *Guild*, 5 Halst. 163; *Commonwealth* v. *Knapp*, 9 Pick. 496; *Commonwealth* v. *Tuckerman*, 10 Gray, 190; *Commonwealth* v. *Morey*, 1 Gray, 461; *Regina* v. *Moore*, 2 Heard's L. Crim. Cas. 499; *Regina* v. *Warringham*, Id. 487; *State* v. *Phelps*, 11 Vt. 116; 1 Greenl. Ev., sec. 223; Roscoe's Crim. Ev. 40, 48; 2 Russ. Crimes, 837; 5 Car. & P. 318; 1 Archb. Crim. Pr. 389, note 1; 2 Russ. Crimes, 839, note n, 840; *People* v. *Johnson*, 41 Cal. 452.)

M. A. Murphy, Attorney General, for Respondent:

I. The indictment contains a sufficient description of the moneys alleged to be embezzled. (*Commonwealth* v. *Sawtelle*, 11 Cush. 142; *Commonwealth* v. *Duffy*, 11 Cush. 145; *McKane* v. *State*, 11 Ind. 195; *Commonwealth* v. *Bennett*, 118 Mass. 443; *Commonwealth* v. *Butterick*, 100 Id. 1; 2 Bish. Crim. Pr., sec. 705; *Commonwealth* v. *Grimes*, 10 Gray, 470; *People* v. *Bogart*, 36 Cal. 245; *Larned* v. *Commonwealth*, 12 Metc. 245, 246; *Commonwealth* v. *Stebbins*, 8 Gray, 492; *Riley* v. *State*, 37 Tex. 763; Bish. Crim. Pr., sec. 319; *State* v. *Smith*, 13 Kan. 274; *State* v. *Walton*, 62 Me. 106; *Brown* v. *State*, 18 Ohio St. 496; *City and County of San Francisco* v. *Randall*, 54 Cal. 408; *Gravatt* v. *State*, 25 Ohio St. 162; *People* v. *De la Guerra*, 31 Cal. 416; *State* v. *Munch*, 22 Minn. 67; *State* v. *Flint*, 62 Mo. 393.)

II. The statement of the defendant to the witness Smith was admissible. Considered as a confession, it was not within any of the rules excluding confessions. It was not made to one in authority. It had no reference to the crime charged in the indictment. There was no inducement held out to defendant of immunity from punishment for any offense, nor was were there any sufficient holding out of temporal advantage to result to himself. (*State* v. *Kirby*, 1 Strob. 155–387; 1 Greenl. on Ev., sec. 222, 223; *Crop-*

per v. *State*, 1 Morris (Ia.), 259; *Teachout* v. *People*, 41 N. Y. 7.)

III. The juror Coyne was a competent juror. The forming and expressing an opinion that a crime has been committed is no disqualification. (*State* v. *Thompson*, 9 Iowa, 188; *Stewart* v. *People*, 23 Mich. 63; *State* v. *Potter*, 18 Conn. 165; *State* v. *Wilson*, 38 Id. 126; *People* v. *Hayes*, 1 Edm. 582; *State* v. *Gillick*, 10 Iowa, 98; *People* v. *Brotherton*, 47 Cal. 388; *People* v. *King*, 27 Id. 507; *Thomson* v. *People*, 24 Ill. 65.)

By the Court, HAWLEY, J.:

Appellant was county treasurer of Storey county from the sixth day of January, A. D. 1879, up to and including the thirtieth day of October, 1880. He was subsequently indicted, tried, and convicted, for the crime of embezzlement, for unlawfully, willfully, and feloniously converting to his own use twenty-one thousand nine hundred and forty dollars and ninety-one cents of the public money, intrusted to his safe keeping, transfer, and disbursement, as county treasurer, alleged to have been committed on the thirtieth day of October, 1880, and before the finding of the indictment. One count charges the public money thus converted to be the property of Storey county. The other charges the same money to be the property of the state of Nevada and the county of Storey. The money is described as "sundry gold and silver coins, lawful money of the United States, and of the aggregate value of twenty-one thousand nine hundred and forty dollars and ninety-one cents, a more particular description of which gold and silver coins and money the grand jury can not give, as they have no means of knowledge."

A demurrer was interposed to the indictment, upon the ground that it "fails to describe any of the moneys alleged to be embezzled, or to state the denominations or character of any of said moneys."

1. It is claimed that the court erred in overruling this demurrer. It is also argued that evidence of a general deficiency is not sufficient to establish the crime of embezzlement; that the evidence must show the conversion of some

particular sum or sums of money received by the officer at some one time, or to have been under his custody or control at some particular time.

We are of opinion that the indictment substantially conforms to the provisions of sections 234 and 235 of the criminal practice act (1 Comp. L. 1858, 1859), and that it is in all respects sufficient. It is unnecessary in an indictment against a county treasurer for embezzlement to specify with certainty the particular kind of funds, whether gold or silver coins or legal tender notes, or to give the denomination of each coin or note, or to specify from whom or what particular time the money was received. As against a public officer, it is sufficient to allege and prove the felonious conversion to his own use of any money that came into his possession, or was under his control by virtue of his office. (*State* v. *Walton*, 62 Me. 109.)

In cases of larceny, or receiving stolen goods, it is usually within the power of the owner to describe the kind and character of money or other property stolen, and in the case of embezzlement by clerks, agents, and servants of private parties there is but little difficulty in giving a particular description of the money embezzled. The acts of the clerk, agent, or servant are generally performed under the direct supervision or control of the principal, who, therefore, has, or may at any time have, full and accurate knowledge of the character of the particular sums, and from whom received, and possesses facilities for tracing out the facts while transpiring or recent. But these considerations do not apply to a county treasurer. He is the only person who knows the kinds and character of money in his custody and under his control. The public at large can exercise no constant supervision over his acts, nor can it, like a private individual, assume the direct custody of the funds at any moment. The proper authorities may, it is true, require him to account, may count and examine the funds in his possession; but all these funds may be changed long before the act of embezzlement is done or the intent is formed, and if the law required the kinds and character of money embezzled, and the particular date of embezzlement of any

particular piece to be stated in the indictment and proved upon the trial, it would, as a general rule, "be wholly impracticable to trace or identify the particular pieces of money or bills, or to determine whether the sums embezzled were in the one shape or the other, or both; and it would be equally impracticable to show that any particular sum embezzled was the same money or funds received from any specified source or person, for, though the amounts might correspond, this would by no means establish their identity. And if the kind of funds received by the treasurer in any particular instance, whether credited upon the books or not, could be identified as received from a particular source, the fact that this was not found in the treasury at any subsequent time would not prove that the same money had been embezzled, as this might have been honestly paid out to public creditors, and an equal amount embezzled in other species of funds, or those received from a different source." (*The People* v. *McKinney*, 10 Mich. 91.)

In the case from which we have quoted, the defendant, McKinney, was state treasurer. He was indicted for embezzlement of the public money under his control. The indictment did not describe the particular kind or character of money or notes alleged to have been unlawfully converted, nor did it state that the character and denominations of said money were to the grand jurors unknown. It was held to be sufficient. This decision was followed and approved by the supreme court of Minnesota, in the case of an indictment against the treasurer of that state, for embezzlement (*State* v. *Munch*, 22 Minn. 67); and by the supreme court of Kansas in the case of a similar indictment against a county treasurer. (*State* v. *Smith*, 13 Kan. 274.)

In *The State* v. *Flint*, 62 Mo. 393, the defendant, who was a sheriff and tax collector, was indicted for embezzlement, and, in considering certain objections urged against the indictment, the court said: "We do not think there is any valid objection to the indictment on account of its failure to state from whom defendant received the money, or to point out what particular money he embezzled, or whether

it was state or county revenue, or how much belonged to either. It is charged that he converted to his own use, while he was in office as sheriff and collector, large sums of money received by him as such, belonging to the state and county revenue, and that was sufficient."

The objections urged to the indictment and to the rulings of the court in giving and refusing certain instructions, as to the sufficiency of the proof of a general deficiency in the accounts of the defendant as county treasurer, can not, for the reasons stated, be sustained.

2. Did the court err in disallowing appellant's challenge to the juror Coyne? This juror, upon his *voir dire*, testified as follows: "I believe and have an unqualified opinion that there was a deficiency in the accounts of the defendant as treasurer of Storey county; but I have neither formed nor expressed an unqualified opinion as to defendant's guilt or innocence of the crime with which he stands charged. * * * I can give defendant a fair and impartial trial upon the evidence." The defendent subsequently interposed a peremptory challenge to this juror, and the record shows that all of his peremptory challenges were exhausted.

The challenge was interposed under the provisions of the eighth subdivision of section 340 of the criminal practice act, which declares that "a challenge for implied bias may be taken for all or any of the following causes, and for no other: * * * Eighth—Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." (1 Comp. L. 1964.)

The object of the law is, as stated in *State* v. *McClear*, 11 Nev. 66, to secure to the defendant and the state a fair and impartial trial. The real condition of the juror's mind must be determined from the whole of his testimony, and if it appears therefrom that he has no deliberate and fixed opinion in favor of, or against the defendant, he is not disqualified by virtue of this provision of the statute.

There is in almost every criminal case some fact which must be proved upon the trial, that is generally, if not universally, known, and is the subject of newspaper comment and of frequent conversations in the community, and if the

knowledge thereof, or the expression of an opinion thereon, would disqualify a person from serving as a juror, it would be impossible in many cases to obtain a competent and intelligent jury.

As a general rule, the opinion of the juror, in order to disqualify him, must be upon the merits; that is, whether "the prisoner is guilty or not guilty of the offense charged," and not upon some one particular fact or feature of the case. Thus, in cases of homicide, it has been held that a juror who has formed the opinion that the defendant did the killing is not incompetent if he has not formed an opinion as to whether the defendant was guilty or innocent of crime in the act of killing. (*State* v. *Thompson*, 9 Iowa, 190; *Lowenberg* v. *People*, 27 N. Y. 342.)

In the case last cited the court said: "It is clear that the forming of an opinion that the prisoner had done an act necessary to be shown, among others, in order to convict him, was not the forming of an opinion that he was guilty of murder or any other crime." So here, the fact that the juror had an opinion that there was a deficiency in the accounts of the defendant, which was a fact to be proved in the case, was not such an opinion as to the defendant's guilt, as, of itself, to disqualify the juror. The fact of the deficiency was not necessarily so intimately blended with the main fact in issue as to prevent the juror from determining the question of defendant's guilt or innocence from the evidence that might be adduced at the trial.

We think it is apparent from the answers given by the juror that his mind was in such a condition as to enable him "to weigh the evidence in impartial scales and a true verdict render according to the law and the evidence." If so, he was a competent juror. (*State* v. *McClear*, 11 Nev. 68.) It is not to be expected, nor does the law require, that a juror will come into court without any opinion whatever. The defendant has only the right to demand that each juror will be free from prejudice and bias, and have no deliberate, fixed, or settled opinion as to his guilt.

In *The State* v. *Lawrence*, a juror had read the accounts of a homicide in the newspapers, and "believed the man

had been murdered and that the defendant did it," but said that he had no bias for or against the defendant, and believed he could try the case as impartially as if he had never heard of the case. He was held to be competent.

The court said: "It is scarcely possible, in a community where an act has been done which startles and attracts the public mind, to obtain a juror, who should be intrusted with so grave a matter as the determination of the question of the guilt or innocence of the accused, whose mind has received no impression with regard to the case. Either from public rumor or newspaper reports, almost every person competent to serve as a juror, will have learned something in regard to the circumstances attending the commission of the alleged offense. And, as some impression, more or less strong, is almost invariably made by such reports, the rule which would demand a juror with no opinion respecting the case, would, in cases attracting public attention, and in which intelligence is most needed, practically exclude every intelligent man from the jury." (38 Iowa, 54.) Similar views are expressed in *The State* v. *Bruce*, 48 Iowa, 536, and in *Stewart* v. *The People*, 23 Mich. 72.

In *The State* v. *Spaulding*, Kansas (reported in American Law Register for February, 1881, p. 110), where the defendant, a city clerk, was indicted for embezzlement, a juror testified "that he had an opinion, founded upon rumor, that public money was missing; that he had no opinion as to the guilt or innocence of the defendant, and that he believed defendant was city clerk." This juror, upon substantially the same reasons which we have already expressed, was held to be competent.

It was, perhaps, unnecessary to refer to any other than our own decisions, for it is clear to our minds, from the principles announced in the concluding portion of the opinion in *State* v. *McClear*, and the views expressed in *State* v. *Davis*, 14 Nev. 439, that the court did not err in disallowing this challenge.

3. Was the confession of the defendant to the witness Smith admissible? Defendant was a candidate for re-election. There was a rumor on the streets that he was a

defaulter. Two of his bondsmen, W. H. Smith and C. Derby, having heard these rumors, became anxious, and were desirous of ascertaining the truth or falsity of the reports concerning the condition of the affairs in the treasurer's office. The defendant, when first spoken to by Smith, denied the rumor. The next day, Mr. Smith met him in front of the court-house, and again stated to him the rumors that were afloat; urged him to have the money counted by J. E. McDonald; said that if the money was not counted it would injure him in the election. Nothing was said in reference to shielding him from a criminal prosecution. None was threatened or spoken of. The remarks of Smith were made, as he testifies, solely "with a view to induce the defendant to allow the money in the treasury to be then counted." Defendant testified that Smith said to him that "there is no use putting this thing off any longer. If you are short, come out and say so, and *we will try and fix it up;*" that thereupon he, Smith, and McDonald went into the treasurer's office, and Derby was sent for; that he understood from Smith's remark "that he (Smith) would assist him in making good his accounts, and that the money deficient would be paid into the county treasury before there would be any count of the money made by the county commissioners," and that if it had not been for said remark he never would have made any statement. Soon after the parties went into the treasurer's office the defendant said: "Boys, I might as well make a clean breast of it. I am short." The witness Smith then asked him in what amount. He said, about twenty-two thousand dollars. He was asked what he had done with the money. He said he "had spent some at the primaries, and had operated some in stocks." We are of opinion that this statement was admissible.

The law excluding confessions is based in a spirit of charity for the weakness of human nature, and rests upon the theory, that a man when charged with crime and threatened with the punishment of the law, or promised immunity therefrom, may be induced, while in an alarmed and excited condition of mind, to make statements that are not

true. Such statements, when so made, are, and should be, excluded by the courts.

But the essential elements that would entitle the defendant to this charity of the law are lacking in the facts of this case. At the time the statement was made, the defendant was not charged with any crime. No complaint had been filed. He was not under arrest. No prosecution was threatened. There was no promise or representation made by Smith which could reasonably have induced the defendant to state things that were not true. Moreover, Smith was not an officer. He had no authority. He did not stand in any such relation toward the defendant as to exercise any undue influence or control over the mind of the defendant as to make his confession inadmissible. It is true that Smith and Derby were jointly liable upon the official bond of the defendant in the sum of twenty thousand dollars; that they might have been able to pay the deficiency in defendant's accounts before the money could have been officially counted by the county commissioners, and it may be, if the accounts had been made good, that no criminal prosecution would have been instituted (although that fact would not have relieved defendant from such prosecution.) But these facts, if they had any influence over the defendant, were only calculated to make him tell the truth. Holding the office he did, it must be presumed, in the absence of any showing to the contrary, that he was a man of ordinary mind and intelligence, and we can not conceive of any reasonable theory which, upon the defendant's own statement of the conversation, could have induced him to tell an untruth as to his guilt.

It is only in cases where the confession is obtained by mob violence, or by threats of harm, or promises of favor or worldly advantage held out by some person in authority, or standing in such intimate relation from which the law will presume that his promises or threats will be likely to exercise such an influence over the mind of the accused as to induce him to state things that are not true, that will authorize the courts to exclude the confession or admission.

Argument for Appellants.

The law in its general application to this question, as well as others, is founded in reason and common sense. Its object is to ascertain the truth, and it is not its purpose to reject any reliable and competent means of attaining it.

The judgment of the district court is affirmed.

[No. 1,055.]

MARY WALL ET AL., APPELLANTS, v. LOUIS TRAINOR ET AL., RESPONDENTS.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY OF—AUTHORITY OF AGENT.—On the trial plaintiffs testified that they sold a quantity of hay to one Dwelly as the agent of defendants. Defendants testified that the hay was sold to Dwelly as the agent of a corporation. Plaintiffs recovered judgment, and the court granted a new trial upon the ground of newly discovered evidence: *Held*, that admissions made by plaintiffs, before and after the trial, that they sold the hay to Dwelly as agent for the corporation, was material, regardless of the question whether Dwelly had the authority to make the purchase.

IDEM—WHEN TESTIMONY IS NOT CUMULATIVE.—Testimony is only cumulative which is in addition to, or corroborative of, what was given at the trial. If the newly discovered evidence brings to light some new fact bearing upon the main question at issue between the parties, and it would be likely to change the result, a new trial should be granted.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Pierce Evans and *William Cain*, for Appellants:

I. If M. B. Dwelly pretended to act as the duly authorized agent of the California Fruit and Meat Shipping Company in the purchase of the hay, the testimony shows without conflict that he was not; and it further appears that this corporation never ratified his acts by acceptance or measurement of the hay or by paying a single dollar of the purchase money; hence, there was no contract for the sale of this hay between plaintiffs and the corporation. There was no sale ever intended by plaintiffs to Dwelly by either party; hence there was no contract between those two parties, and so

there was no sale to the corporation nor to Dwelly; and the title had not passed from plaintiffs, and was in them, even under the theory and proposed testimony and proof of defendants, when they measured and fed the hay to their cattle. (Benjamin on Sales, 406, sec. 443; *Cundy* v. *Lindsay*, 19 Eng. Rep. 237; 24 E. R. 345; *Hardman* v. *Booth*, 1 Hurlst. & Colt (Exch.), 803; *Higgins* v. *Burton*, 26 L. J. (Exch.) 342; *McGoldrick* v. *Willits*, 52 N. Y. 612; *Pease* v. *Smith*, 61 Id. 477; *Bearce* v. *Bowker*, 115 Mass. 129.)

II. Before granting a new trial, the court must be satisfied that the newly discovered evidence is so material that it would probably produce a different verdict if the new trial were granted. (1 Saw. 291.) The evidence is merely cumulative. (*Gray* v. *Harrison*, 1 Nev. 502; *Howard* v. *Winters*, 3 Id. 542.)

III. The action is proper in form, and no objections have been taken thereto in the court below. (*McGoldrick* v. *Willits*, 52 N. Y. 620; 2 Greenl. Ev., sec. 108; *Wiegand* v. *Sickel*, 3 Keys, 122; *Coghill* v. *Marks*, 29 Cal. 677.

Webster & Rankin, for Respondents.

By the Court, LEONARD, C. J.:

Plaintiffs obtained verdict and judgment for one thousand two hundred and fifty dollars, balance alleged to be due for hay claimed to have been sold to defendants. The court granted a new trial on the ground of newly discovered evidence material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial. This appeal is from the order granting a new trial.

It is not disputed that plaintiffs sold the hay to one Dwelly, acting as agent either for the defendants or the California Fruit and Meat Shipping Company, a corporation incorporated in the state of California, doing business in this state. Plaintiffs claimed, and their evidence tended to show, that Dwelly made the purchase as the agent of defendants, while defendants claimed, and their evidence tended to show, that he was not their agent, but was the

agent of said corporation, that is to say, general superintendent, and that he purchased the hay for the corporation. The principal question agitated at the trial was, "To whom was the property sold?"

It is urged by counsel for appellants that the newly discovered evidence is not material, and that it is cumulative. If they are correct as to either assertion, a new trial should not have been granted upon the ground stated by the court. The claim of immateriality is based upon the statement that, "Dwelly knew he was not contracting for the corporation, and that he had no authority to purchase; * * * that the only evidence to help defendants would be to the effect that, Dwelly actually had authority, or that the corporation had actually purchased it, or had ratified his unauthorized acts."

It makes no difference in this action, whether the corporation purchased the hay or not, except that it may be said if the purchase was made by the corporation it could not have been made by the defendants. The question to be decided was: Did the *defendants* make the purchase? That fact could not be established affirmatively by proving that Dwelly was not authorized to purchase for the corporation. If the defendants could prove that the sale was actually made to the corporation through Dwelly, its general superintendent, that proof would negative the idea that it was made to defendants, whether Dwelly was authorized to make the purchase or not. There was, in fact, no testimony that he had not authority; but had ample proof of that fact been made, plaintiffs ought not to have recovered without satisfying the jury that Dwelly acted as agent for defendants, or that they ratified his purchase after being advised of the facts. So it is not true that the only evidence that will help defendants is proof of Dwelly's authority. The burden of proof was upon the plaintiffs to show that they sold to defendants. In the absence of such proof, they could not recover in any event; but there was evidence tending to establish that fact, as well as evidence tending to disprove it. Plaintiffs testified, positively, that they sold to Dwelly for defendants, and that the corporation was not mentioned;

while Dwelly and Trainor were as positive that the corporation was the purchaser, and that defendants were strangers to the transaction. Such being the facts, it is idle to deny the importance to defendants of admissions by plaintiffs, made before and after the trial, that they sold the hay to Dwelly for the corporation, regardless of the latter's authority to make the purchase.

We now come to the second objection: Is the newly discovered evidence cumulative? In *Gray* v. *Harrison*, 1 Nev. 508, the court said: "These admissions * * * are new and independent facts, unknown to defendants at the time of trial. Had these admissions been proven at the trial the testimony of other witnesses to the same admissions would be merely cumulative. But that only is cumulative which is in addition to, or corroborative of, what has been given at the trial. To render evidence subject to this objection it must be cumulative, not with respect to the main issue between the parties, but upon some collateral or subordinate fact bearing upon that issue. * * * If the newly discovered evidence brings to light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted." (See authorities cited in the opinion.)

"The rule that newly discovered evidence must not be cumulative, though well settled, has an occasional exception. Where, by admitting it, what was before mysterious and doubtful becomes plain and certain, so that if received the most obvious justice, and if rejected the most palpable injustice, will be done, courts do not hesitate to adopt the former alternative." (Graham and Waterman on New Trials, vol. 3, 1064.) There was no testimony as to admissions by plaintiff, Mary Wall, that the hay was sold to the corporation. The only evidence of any admission by her was her own statement upon cross-examination, that she "might have said in Miss Harney's milliner shop that she had sold her hay to Dwelly."

As to her, the newly discovered evidence is that, she stated to affiant Coats, about the time of the sale: "Well, I have sold my hay. * * * I have sold it to Dwelly for the

Meat Shipping Association;" that she "did not mention Trainor or Graham's names, or any one else, but said she had sold her hay to Dwelly for the Meat Shipping Association;" that she always said "she looked to Dwelly for the payment." Her testimony at the trial supported plaintiffs' theory that the sale was to defendants and not to the corporation. As to this plaintiff's alleged admissions, there is no ground for the claim that the newly discovered evidence is cumulative.

Some portions of the alleged admissions of plaintiff McCrey were testified to upon the trial. Defendant Trainor stated that, he told McCrey he "had contracted the cattle to the Meat Shipping Association, and asked him if it was responsible, and he said it was perfectly responsible;" that "they had sold their hay to it and the company had not yet paid them, but he only wished it owed them five times as much as it did." And another witness (Brown) said that "about November 1, 1878, McCrey told him he had sold two hundred and fifty tons of hay to Dwelly for the Meat Shipping Company, at seven dollars a ton;" and that "McCrey always spoke of the sale in the same way."

As to McCrey's admissions set out as newly discovered, much of it is like that stated by witnesses Trainor and Brown. But there is much in addition. This is especially true of the evidence newly discovered, as to what McCrey told W. F. Berry before and after the trial, if Berry speaks the truth. He states in his affidavit, among other things, that a few days before the trial, McCrey said to him that he "looked upon Louis Trainor, defendant, as a very honorable man;" that he was "sorry anything had occurred between himself and Trainor (meaning the lawsuit), and if he had sold his hay to Trainor he would not have had any trouble about getting his pay for his hay, as he believed;" but that he "had sold his hay to Dwelly to feed stock that Dwelly had bought for the Meat Shipping Company;" * * * that "a few days after the trial, at Reno, McCrey stated to him that they had gained the suit, and he was sorry about the matter, but he had to try and get his money;" that "he had sold his hay to Dwelly for the Meat Shipping Company,

but that he could not get his money from that company;" that "Trainor's cattle had eaten the hay and Trainor should pay for it;" that "he should have his pay from somebody, since he could not get it from the Meat Shipping Company;" "that he did not expect any trouble about his money until the Meat Shipping Company refused to honor the last checks he received from Dwelly." Much of this evidence is not cumulative in the proper sense of that word. The court did not err in granting a new trial upon the ground stated in its order, and the order is affirmed.

[No. 1,070.]

THE STATE OF NEVADA, EX REL. M. A. MURPHY, ATTORNEY GENERAL, *v.* J. B. OVERTON ET AL., TRUSTEES OF THE NEVADA BENEVOLENT ASSOCIATION, RESPONDENTS.

LOTTERY — ACT TO AID NEVADA BENEVOLENT ASSOCIATION UNCONSTITUTIONAL.—The act to aid the Nevada Benevolent Association in providing means for the care and maintenance of the insane of Nevada (stat. 1881, 166) provides, that it shall be lawful for the association to give public entertainments, to sell tickets of admission, to distribute among the ticket-holders personal property, etc., and to regulate the distribution by raffle or other schemes of like character: *Held*, that the scheme or enterprise in which the association is engaged is a lottery, and that the act is unconstitutional.

QUO WARRANTO, before the Supreme Court.

The facts appear in the opinion.

M. A. Murphy, Attorney General, for Relator:

I. The Nevada Benevolent Association never has been a corporation under the laws of this state; because section 3389 of the compiled laws does not authorize the formation of corporations for the purpose of holding or conducting public entertainments or gift enterprises.

II. The privileges and franchises usurped by the said board of trustees are not legitimate or legal, because they have attempted to usurp a franchise without authority of

law, and to do those things which by law they were and are prohibited from doing. (Sec. 2494, Comp. L.) The articles of incorporation upon their face show that the company has been formed for an illegal purpose, that of giving concerts or gift enterprises where property is to be distributed by a game of chance.

III. The act of the legislature of March 9, 1881, is unconstitutional, because it is in conflict with section 24, article IV., of the constitution. (The authorities cited by counsel are referred to in the opinion.)

IV. The constitution of a state is higher in authority than any law made by any body or any set of officers assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation was made. In such case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity. (Cooley on Const. Lim. 43, 44; Potter's Dwarris on Stat. and Const. 44.) By the constitution which the people establish, they not only tie up the hands of their official agencies, but their own hands as well, and neither the officers of the state nor the whole people, as an aggregate body, are at liberty to take action in opposition to this fundamental law. (Cooley's Const. Lim. 28; Potter's Dwarris on Stat. c. 1.)

V. The Nevada Benevolent Association scheme is a lottery, within the ordinary meaning of the word as defined in the English dictionaries. "It is a distribution of prizes by chance," which is one of the definitions of a lottery by Johnson and Webster. It is a kind of a game of hazard, wherein several lots of merchandise, property, or money are deposited in prizes for the benefit of ticket-holders. (Brand's Encyclopedia, American Cyclopedia, Encyclopedia Britannica, title Lotteries; Bouv. L. Dic., title Lottery. Other authorities cited are referred to in the opinion.)

VI. A repealing clause in an unconstitutional act does not repeal the former law. (*State* v. *McClear*, 11 Nev. 39; *Tims* v. *State*, 26 Ala. 165; *People* v. *Tephaine*, 3 Park. Crim. L. 241; *Shepardson* v. *M. B. R. R. Co.*, 6 Wisc. 614; *State* v.

Judge of County Court, 11 Id. 50; *Sullivan* v. *Adams*, 3 Gray, 476; *Devoy* v. *Mayor et al. of N. Y.*, 35 Barb. 270; *Campau* v. *Detroit*, 14 Mich. 276; *Childs* v. *Shower*, 18 Iowa, 261; *Harbeck* v. *Mayor of New York*, 10 Bosw. 366.)

A. C. Ellis, *B. C. Whitman*, and *W. H. L. Barnes*, for the Respondents:

I. No facts are stated in the complaint to warrant a forfeiture under any law of this state. Sections 389 and 400 of the compiled laws govern the case stated, if any, which we deny, but the proceeding here referred to, must be brought by the district attorney. And besides, no facts are stated, which under any of these sections, would either work a forfeiture, or upon which a judgment can be based, declaring that this "Nevada Benevolent Association" never had a legal existence.

II. The allegation that these trustees base their right to do the things alleged upon an act of the legislature subsequently passed, is not an allegation of fact, it is ideal, it is speculative, it is abstract; nor is it a threat of future action, it is a statement of a present belief and opinion of the trustees, which may to-morrow be modified or changed. And we maintain that the validity of this act can not be called in question in this manner. (*Burling* v. *Goodman*, 1 Nev. 314; *Hess* v. *Pegg*, 7 Id. 23; *Overman S. M. Co.* v. *Amer. M. Co.*, Id. 322; *Phillips* v. *Welch*, 11 Id. 187; S. C., 12 Id. 159.)

III. The law in question is constitutional. It is presumed to be so unless it can be clearly made to appear to the contrary. Every intent is in favor of the constitutionality of the law. (*Ash* v. *Parkinson*, 5 Nev. 15; *Clarke* v. *Irwin*, Id. 111; *Evans* v. *Job*, 8 Id. 132.) It was the intention of the framers of the constitution to prevent the state as such from engaging in lotteries to raise revenue. (Const., art. 4, sec. 24.) This section was taken *verbatim* from the constitution of California, adopted in 1849 in convention, and was adopted by the convention of Nevada without debate. An examination of the debates of the California convention will show that this idea prevailed.

Those who opposed the section, did so upon the ground that the lottery was a desirable and convenient mode of raising revenue, and those who favored the section did so upon the ground that it was desirable that the state should raise its revenue otherwise, and by a different mode of taxation. (Debates in the Convention of Cal., 90, by J. Ross Browne.) Such was the original idea of lotteries. A historical review of this subject may be found in the Encyclopedia Brit., tit. Lottery; New American, tit. Lottery; Chambers, tit. Lottery.

IV. The language of our constitution, considered by itself, imports the same idea, and is exceedingly inapt to express the ideas claimed for it by the attorney general. "No lottery shall be authorized by this state." This is not a state lottery, if it is a lottery (which under the allegations of this complaint we deny); the state exercises no control. It is not said that it will be drawn under the auspices of the state, nor managed or controlled by officers or appointees of the state, nor at any place designated by the state, nor upon any terms or conditions named by the state.

V. No penalty is denounced in the constitution. If it be a crime or misdemeanor to carry on a lottery, it must be so defined by the legislature or the common law, and punished accordingly, but there is no statute of Nevada defining or punishing a lottery. But it is said the statute of 10 and 11 William III. is in force in this state, which statute defined and declared a lottery to be a public nuisance, and that it was so held in *Ex parte Blanchard*, 9 Nev. 101; 4 Bl. 168; but this will not aid the relator. If it is a public or common nuisance, it was either a crime or a misdemeanor, and as such can only be punished by indictmment. (3 Bl. 220.) But which was it, a crime or a misdemeanor? This must be determined in order that it can be punished at all under our statute.

VI. The statute of William declaring a lottery a public nuisance is not in force in this state; because our legislature has undertaken to declare what shall constitute public or common nuisances and to prescribe punishments therefor, and has omitted any reference to lotteries; and second,

the law in question repeals not only the lottery act of 1873 in terms, but also "all other acts (laws) or parts of acts in conflict with this act." It can not be argued that the repeal of this law is unconstitutional. The constitution did not forever fasten the statute of William III. upon us. The legislature surely has the power to repeal any law concerning lotteries.

VII. The act of 1873 to prohibit lotteries is repealed. (*Meshmeier* v. *State*, 11 Ind. 489; *Rhody Ely* v. *Thompson*, 3 A. K. Marsh. 70; *Tims* v. *State*, 26 Ala. 165; *McCarthy* v. *Judge Monroe Circuit*, 36 Mich. 275; *Yellow R. Imp. Co.* v. *Arnold*, 46 Wisc. 227.)

R. M. Clarke, also for Respondents:

I. Lotteries are (1) public or (2) private: public when organized and managed by the government for the benefit of the public and as a means of obtaining revenue; private when organized and managed by private individuals for private gain. It is matter of common knowledge that many governments, among them Austria, France, Great Britian, and many of the states of the American Union, have resorted to lotteries in order to raise money for the public service, and that until recent years, public lotteries have almost universally prevailed. (See New Am. Cyclopedia, vol. 10, 663, 664, 665; Whart. L. Dic. 467.)

II. The constitution is not couched in apt or proper words which express the intention to prohibit private lotteries or any lotteries except public. If it had been intended to prohibit all lotteries or private lotteries, the words "by this state," should have been omitted; but the addition of these words, otherwise unnecessary, can only be accounted for upon the theory that their use was intended to qualify, limit, and restrict the sense and application of the section to lotteries "by this state," that is to say, state lotteries, or lotteries carried on by the state for the purpose of raising revenue.

By the Court, HAWLEY, J.:

On the nineteenth day of February, A. D. 1881, articles

of incorporation of the "Nevada Benevolent Association" were filed in the office of the county clerk of Storey county. The object of the corporation being "to establish and carry on the business of providing for and giving public entertainments, in the state of Nevada, of a musical and scientific character, to sell tickets of admission to such entertainments, and to purchase, hold, and distribute among the holders of such tickets personal property, real estate, choses in action, and other valuable things, upon such terms and conditions and in such manner and at such times as may be determined by a board of managers to be selected for that purpose by the board of trustees of this company." It is provided that so much of the proceeds of said entertainments "as may be deemed proper by the board of trustees, but not less than fifty thousand dollars, from each entertainment, are to be placed in the state treasury of the state of Nevada to be used only for such charitable and benevolent purposes as may be determined by the legislature of the state of Nevada."

The "Act to aid the Nevada Benevolent Association in aiding in providing means for the care and maintenance of the insane of Nevada, and for other charitable purposes" (approved March 9, 1881), declared that "it shall be lawful for the Nevada Benevolent Association of the state of Nevada to give not exceeding five public entertainments or concerts, to sell tickets of admission to the same; to distribute among the holders of such tickets personal property, real estate, things in action, demands or other valuables, and to regulate the distribution of all such property or gifts by raffle or other schemes of like character." (Stat. 1881, 166, sec. 1.)

The information filed by the attorney general alleges that respondents, as trustees of said association, are, without warrant of law, "advertising, printing, circulating, and selling tickets for public entertainments * * *," and that they "base their right to advertise, print, circulate, and sell tickets for the said public exhibitions or entertainments, and to purchase, use, hold, and distribute amongst the holders of such tickets personal property, real estate,

choses in action, and other valuable things," upon the act of the legislature above referred to.

The facts set forth in the information are admitted by respondents to be true. Are the acts of respondents without warrant of law? Is the act of the legislature, approved March 9, 1881, constitutional?

1. Is the scheme or enterprise in which the "Nevada Benevolent Association" is engaged a lottery? This question is answered in the affirmative by the decision of this court in *Ex parte Blanchard*, 9 Nev. 104. Is that decision correct? It certainly is. It is sustained by every decision that has been rendered by the various courts in the United States upon this question.

Notwithstanding this fact, we are now earnestly asked to declare that the musical entertainment which the "Nevada Benevolent Association" proposes to give is not a lottery. Why not? What is a lottery? Every scheme for the distribution of prizes by chance is a lottery. (*Governors of the Almshouse of New York* v. *American Art Union*, 7 N. Y. 239; *Dunn* v. *The People*, 40 Ill. 467; *State* v. *Shorts*, 32 N. J. L. 401; *Randle* v. *State*, 42 Tex. 585; *Chavannah* v. *State*, 49 Ala. 396; *Commonwealth* v. *Manderfield*, 8 Phil. 459; *United States* v. *Olney*, 1 Abb. U. S. C. C. 279.)

A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. (*Bell* v. *State*, 5 Sneed, 509.) "A contrivance for the distribution of prizes by chance; a reliance upon the result of hazard; a decision of the values of the adventurer's investment of the favors of fortune" is a lottery. (*Wooden* v. *Shotwell*, 4 Zab. 795.) "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery." (*State* v. *Clarke*, 33 N. H. 335; *Hull* v. *Ruggles*, 56 N. Y. 427.)

If a tract of land is divided into lots of unequal value, and the lots sold to different purchasers at a uniform price, and are distributed amongst those purchasers by drawing or lot, this transaction is a lottery. (*Seidenbender* v. *Charles*,

4 Serg. & R. 160; *Ridgeway* v. *Underwood*, 4 Wash. C. C. 133; *Wooden* v. *Shotwell*, 3 Zab. 466; *United States* v. *Olney*, 1 Abb. U. S. C. C. 278.) Where the payment of five dollars by a member of the "American Art Union" entitled him to a chance of drawing a painting by means of names and numbers drawn from a box—this was held to be a lottery. (*Governors of Almshouse* v. *American Art Union*, *supra*.) A "gift sale" of books, according to a scheme by which the books are offered for sale at prices above their real value, and by which each purchaser of a book is entitled, in addition, to a gift or prize, is a lottery. (*State* v. *Clarke*, *supra*.)

In *Dunn* v. *People*, *supra*, the defendant was conducting a "gift sale" establishment. He kept upon his desk, at his place of business, a box filled with envelopes. Each of the envelopes had printed upon its back an advertisement, purporting that the envelope contained some valuable recipes and popular songs, and also a card descriptive of some article in an "immense stock of over two hundred and fifty thousand pianos, watches, sewing-machines, engravings, sets of jewelry, books, etc., worth one million five hundred thousand dollars, all to be sold for one dollar each, without regard to value, and not to be paid for until you know what you are to receive." The sale of one of these envelopes was held to be a sale of a lottery ticket.

A ticket which purports to entitle the holder to whatever prize may be drawn by its corresponding number in a scheme called a "prize concert," is a lottery ticket. (*Commonwealth* v. *Thacher*, 97 Mass. 583) A ticket in a "grand gift concert," for the benefit of the "Foundling Asylum of the Sisters of Charity, in the city of New York, and the Soldiers' and Sailors' Orphans' Home, of Washington, D. C.," stating that the bearer was "entitled to admission to a grand concert, * * * and to whatever gift may be awarded to its number," is a lottery ticket. (*Negley* v. *Devlin*, 12 Abb. Pr., N. S., 210.)

It makes no difference what name is given to the scheme.

> "A rose by any other name would smell as sweet;
> A thorn by any other name would prick as deep."

When the element of chance enters into the distribu-

tion of prizes it is a lottery, without reference to the name by which it is called. "He may choose to call his business a gift sale," said the court in *Dunn* v. *People*, *supra*, "but it is none the less a lottery, and we can not permit him to evade the penalties of the law by so transparent a device as a mere change of name. If it differs from ordinary lotteries, the difference lies chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thoroughly dishonest and injurious to society."

"The name given to the process and the form of the machinery used to accomplish the object are not material, provided the substance of the transaction is a distribution or disposition of property by lot." (*State* v. *Clarke*, *supra*.) Courts will not inquire into the name, but will determine the character of the scheme by the nature of the transaction or business in which the parties are engaged. (*Randle* v. *State*, *supra*.) "The character of the scheme is in no wise changed by the charitable purposes expressed in its title, nor by calling the drawings 'entertainments or gift concerts.'" (*Ex parte Blanchard*, *supra*.)

The fact that no plan of distribution has been determined upon does not relieve the scheme of its character as a lottery. (*Thomas* v. *People*, 59 Ill. 163.) "Nor is it material," said the court of appeals in *The American Art Union case*, "to the question in hand that the prizes were not known and designated when the tickets or chances were subscribed and paid for. The scheme in this respect is more objectionable than a scheme in which the prizes are previously fixed, because it affords less security to the subscribers that the chance purchased is worth the money paid for it."

We are of opinion that the facts stated in the articles of incorporation, in the statute, and in the information, show that the scheme is one whereby the legislature of this state, in consideration of the sum of $250,000, to be placed in the state treasury, to the credit of the "insane and charitable fund," attempted to authorize the managers of the "Nevada Benevolent Association" to enrich their own

pockets, at the expense of the people of this and other states, by holding out promises of the great and sudden gains that might be acquired by the ticket-holders; that golden prizes would be "the lure to incite the credulous and unsuspecting into this scheme."

In the light of all the facts that have been presented, it would be absurd to say that the managers of this scheme are simply prompted by deeds of charity and pure benevolence. We think it is fair to presume that some of the purchasers of tickets to the entertainments, to be given by the association, would receive blanks; but even if every ticket-holder drew a prize, the scheme would still be a lottery.

In *Wooden* v. *Shotwell, supra,* the court said: "The prizes were distributed by lot. The fact that the scheme contained no blanks, but that every adventurer was to receive something for his money, only rendered the device the more successful, and its results consequently the more injurious, without altering its essential character." In *Dunn* v. *The People, supra,* the court said: "Neither would the character of the transaction be changed by assuming that the ticket in every envelope really represents some article of merchandise intrinsically worth the dollar which the holder will be obliged to pay. If every ticket in an ordinary lottery represented a prize of some value, yet, if these prizes were of unequal values, the scheme of distribution would still remain a lottery."

In the face and teeth of the decisions which we have referred to, we can not say that the scheme proposed by the "Nevada Benevolent Association" is not a lottery. It has the essential elements and attributes of a lottery; the distribution of prizes by chance. It is a lottery within the definition given in the dictionaries; it is a lottery according to the ordinary acceptation of that word; it is a lottery within the terms specified by the legislature of this state in the "act to prohibit lotteries" (Stat. 1873, 186); it is a lottery within the meaning of that word as used in the constitution.

2. Is the act approved March 9, 1881, constitutional? This question is as clear and plain to our minds as the one already decided. It will not admit of any reasonable doubt.

The language of the constitution is susceptible of but one meaning. There is no room for construction. Nothing upon which any real or substantial argument can be based.

"No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed." (Const. art. 4, sec. 24.) The act in question attempts to authorize a lottery, and to allow the sale of lottery tickets in this state in direct violation of the plain letter and spirit of this provision of the constitution. It would be a perversion of the language of the constitution to say that the act is valid.

Respondents, however, contend that the constitution "does not prohibit private lotteries, and was by its framers intended only to prevent the legislature from involving the state in a system of public lotteries as a means of raising money for the service of the state," or, in other words, that this constitutional provision was only intended as a limitation of power to prevent the state, as a state, from engaging in public lotteries for the purpose of raising means for the general revenue of the state. Hence they claim that the state has the right to authorize private parties to conduct and carry on a lottery of the character specified in the information.

In support of this position they refer to the debates of the constitutional convention in California upon the adoption of a provision in the constitution of that state identical with ours. It is not claimed that these debates have the weight of a judicial decision, but that it is proper to examine them in case of doubt as to the intention of the framers of the constitution. The remarks of the different members shed but little light upon the real question at issue. They are as much in favor of the position taken by the attorney general as they are in favor of the respondents. The debates show that the constitution of New York was referred to in discussing the provision that was adopted in California. Mr. Halleck, who was in favor of the adoption of the lottery provision, in the course of his argument, said: "In nearly all the new constitutions you will find this clause. It was not contained in the old constitutions, but in most cases, where they have been amended, it has been introduced. In the old consti-

tution of New York, to which reference has been made in the course of debate, no prohibition was inserted. Many gentlemen present would remember the famous *case of Yates and McIntyre*, which involved not only individuals of the state in ruin, but was the occasion of serious embarrassment to the state government itself. The result so clearly established the evils of the lottery system that the convention of New York, in 1846, inserted a clause in the very first article of the new constitution (see sec. 10) prohibiting lotteries and sale of lottery tickets. It appeared to him * * * that this prohibition was one of the best that could be inserted in the article limiting the powers of the legislature."

The language of the tenth section of article 1 of the constitution of 1846, referred to by Mr. Halleck, is as follows: "Nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state."

In *The Governors of the Almshouse* v. *American Art Union*, *supra*, it was contended by Charles O'Conor, counsel for the Art Union, as it is here, that the constitution was only intended to prevent the mischievous practice of raising a revenue by public lotteries, which had been for many years in full vigor both in England and in this country, and that the prohibitions of the constitution were only directed against this particular evil. He referred to the fact, as do counsel here, that "from 1709 to 1824 public lotteries were authorized at every session of parliament." He also referred to the debates of the constitutional convention of 1821, for the purpose of showing that "public lotteries for pecuniary prizes as a means of raising revenue were alone within the contemplation of that body."

The constitution of 1821 is in these words: "No lottery shall hereafter be authorized in this state, and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law." The court of appeals, in referring to this constitution, which it declared to be substantially the same as the constitution of 1846, said: "This prohibition is general. It must be held to embrace all lotteries, unless there be some very clear and satisfactory reason for understanding it

in a more limited sense. It was urged upon the argument, that public lotteries for pecuniary prizes as a means of raising revenue were alone within the contemplation of the framers of the constitution. But lotteries have never been created within this state for the purposes of general revenue, and there is therefore no ground for believing that the prohibition was intended to be limited to lotteries for that object. This would have been restraining a mischief which did not exist, and tolerating that which did. Lotteries had been authorized by the legislature for the benefit of colleges, for the making of roads, for the building of bridges, for the improvement of ferries, for the erection of hospitals, and for various other purposes equally commendable and beneficial. All these were clearly within the prohibition. The prohibition was not aimed at the objects for which lotteries had been authorized, but at that particular mode of accomplishing such objects. It was founded on the moral principle, that evil should not be done that good might follow, and upon the more cogent practical reason, that the evil consequent on this pernicious kind of gambling greatly overbalanced, in the aggregate, any good likely to result from it. The promotion of the fine arts is undoubtedly a commendable object, but the prohibition contains no exception in its favor on that ground. * * * The intention of the framers of the constitution undoubtedly was to forbid the future granting of any such lotteries as had at any time previously been authorized by law, and by requiring the legislature to pass laws to prevent the sale of *all lottery tickets*, to put an end to all such distributions of money or goods by lot or chance as had theretofore been forbidden by statute under the name of private lotteries."

The argument that the words "by this state" were inserted for the purpose of preventing the legislature from authorizing public lotteries as a means of raising revenue, and that the provision was not intended to prevent the legislature from authorizing private lotteries, is wholly untenable. No authority has been produced in its support, and we are satisfied that none can be found.

In construing this provision of the constitution the last

sentence is as important as the first. If the framers of the constitution had intended by the use of the words, "No lottery shall be authorized by this state," to only limit the legislative power to public lotteries, conducted and managed solely by the state for the purpose of raising revenue, they would not have used the language they did in the concluding sentence: "Nor shall the sale of lottery tickets be allowed." These words clearly show that it was not intended that any lottery should be authorized by this state for any purpose.

The words "by this state," as used in our constitution, and the words "in this state," "or within this state," as used in the constitutions of New York, have virtually the same meaning. "No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed." This language applies to all lotteries, whether public or private. To lotteries conducted by the state; by the church; by private individuals; by benevolent and charitable associations, and by corporations. No lottery of any kind can be authorized by the legislature under the present constitution.

The constitution of Texas is as follows: "No lottery shall be authorized by this state, and the buying and selling of lottery tickets within this state is prohibited." Here the words "no lottery shall be authorized by this state," upon which respondents rely for their construction, are identical with the words in our state constitution. The balance of the provision is substantially the same.

The supreme court of Texas, in construing the constitution of that state, said: "The constitutional provision needs no aid to show what is meant, so far *as the granting authority by any power in the state to establish a lottery is concerned,*" and declared that "the operation of the 'Galveston Gift Enterprise Association' shows clearly that it is, in its operation and essence, a scheme for the distribution of prizes by chance, or, in other words, is a lottery, within the very letter and spirit of the law, and is a *plain infringement on the constitutional inhibition of lotteries.* That the act to regulate taxation, June 3, 1873, 'which levies an occupation tax upon gift enterprises,' has no force

or power to legalize this or any of its kindred offenses." (*Randle* v. *State*, 42 Tex. 589.) This decision is approved by the court of appeals, in *Holoman* v. *State*, 2 Tex. (Ct. of Ap. 612).

The constitution of Indiana reads as follows: "No lottery shall be authorized, nor shall the sale of lottery tickets be allowed." (Art. 4, sec. 8, Const. 1851.) Under this provision the supreme court declared that no lotteries could be authorized by the legislature. (*Whitney* v. *State*, 10 Ind. 405; *Swain* v. *Bussell*, 10 Ind. 438.) The constitution of Missouri reads as follows: "The general assembly shall never authorize any lottery, nor shall the sale of lottery tickets be allowed." It was held that this provision prohibits the legislature from authorizing any lottery, and forbids the allowance of the sale of lottery tickets. (*Kitchen* v. *Greenabaum*, 61 Mo. 114.)

We again repeat what, it seems to us, must be evident to every unbiased and impartial mind, that the language of the constitutional provision is too plain for argument. That under it the legislature can not authorize any lottery in this state, and that the act approved March 9, 1881, is null and void. We are conscious of the fact that it was unnecessary to add anything to the reasoning of this court, in *Ex parte Blanchard*, which is, of itself, absolutely conclusive upon both of the points we have discussed. But it has been attempted, by a desire upon our part, to show that no authority could be found in any of the adjudicated cases in the United States to sustain the position contended for by respondents; and that no argument has been advanced by respondents, upon either of these points, that has not heretofore been decided adversely to them by the courts of other states, where the constitutional provisions are substantially the same as our own.

It is proper to add that we have arrived at the conclusion stated without considering the question of the morality, or immorality of this particular scheme. It makes no difference whether it was set on foot purely for the purpose of raising revenue for the benefit of the "insane and charitable fund" of this state, or whether it belongs to that class

of lotteries that are made up of pecuniary prizes and minister to the love of gain; whose schemes address themselves in the grossest and most revolting form directly to that sordid passion, and to no other sentiment; where the managers receive a pecuniary profit and enlist "a corps of active seducers to draw the weak and unwary into the purchase of tickets" by extensive advertisements containing brilliant pictures of the favorable chance to acquire sudden wealth.

It may be admitted for the purposes of this decision, as was argued by respondents' counsel, that the people of this state are essentially a gambling people, ready at all times to take the desperate chances which lotteries afford, and that no injurious effects upon the morals of the people would result if this game of chance was allowed to proceed. This question is one that must be considered as settled by the adoption of the constitutional provision. (*Ex parte Darling*, recently decided.)

In the *Art Union case*, to which we have frequently referred, it was claimed that the enterprise was really of a meritorious character, and that it differed, in this respect, from the lotteries where the managers were to receive the lion's share of the profits. The court, in answer to this argument, said: "If no lotteries had existed, excepting such as is contained in the Art Union scheme, it is not probable that they would have been forbidden by the constitution or by law. Its mischiefs are certainly not so apparent as if its prizes were to be paid in money, or as it would be if framed for the purpose of enticing the necessitous and improvident into its hazards. But this case can not be decided according to the views we may entertain of the probable good or evil consequent upon the execution of the scheme. *The constitution took away the power of determining whether this or any other lottery was of good or evil tendency*, and certainly did not intend to confer that power on the judicial tribunals. If it were to be admitted that the scheme is entirely harmless in its consequences, it would form no ground for making it by judicial construction an exception to the general and absolute constitutional prohibition."

Points decided.

Courts can not make any distinction in this respect, as to the nature of the transaction or the character of persons engaged in it. It is their bounden duty to declare the law. "The law knows no person; it is not made for the individual man, but for men. As the dew of heaven falls, so it bears alike upon the just and unjust." (*State* v. *Pierce*, 8 Nev. 304.) It smiles and frowns upon all alike. It makes no distinctions. Submission to its authority is incumbent upon all.

3. It is unnecessary to discuss any of the other points suggested by respondents' counsel. We will not presume, in advance, that respondents intend to violate the law. From the views already expressed it is apparent that it would make no difference whether respondents base their right to act in the premises under the articles of incorporation or under the provisions of the act of the legislature. In either event their acts would be without warrant of law.

The judgment of this court is that the respondents have no right, liberty, or franchise by virtue of any law, to advertise, print, circulate, or sell any tickets in the scheme or enterprise of the "Nevada Benevolent Association," within this state, or to do any of the acts specified in the statute, "to aid the Nevada Benevolent Association," approved March 9, 1881 (Stat. 1881, 166); and that the costs of this proceeding be taxed against them.

[No. 1,064.]

THE STATE OF NEVADA EX REL. W. R. KING, *v.* J. F. HALLOCK, STATE CONTROLLER, RESPONDENT.

PRESIDENT PRO TEM. OF THE SENATE NOT ENTITLED TO EXTRA PAY—CONSTITUTION.—The legislature passed an act in favor of relator, for payment of his services as president *pro tem.* of the senate, in addition to his regular pay as a senator: *Held*, that this was in effect an attempt to increase his compensation as a senator, and hence, unconstitutional. (Art. 4, sec. 33.)

IDEM—OFFICER.—No money can be drawn from the treasury as compensation to an officer of the legislature, except when the compensation has been fixed by a law in force prior to the election of such officer. (Const., art. 4, sec. 28.)

APPLICATION for mandamus.

The facts are stated in the opinion.

T. D. Edwards, for Relator.

M. A. Murphy, Attorney General, for Respondent.

By the Court, BELKNAP, J.:

The relator is a state senator, and represented the county of Lyon, in the senate, during the session of 1881. At the commencement of the session he was elected president *pro tem.* of the senate, and acted as such whenever thereunto requested by the president of the senate, the lieutenant governor. At the close of the session that year the legislature passed an act directing the state controller, the respondent in this proceeding, to issue his warrant for one hundred and twenty dollars in favor of relator for payment of his services as such president *pro tem.* The respondent refuses to comply with the commands of the statute for the reason that it undertakes to increase the compensation of a member of the legislature during the term for which he was elected, contrary to the limitations of the state constitution.

The clause of the constitution relied upon reads as follows: "The members of the legislature shall receive for their services a compensation to be fixed by law, and paid out of the public treasury; but no increase of such compensation shall take effect during the term for which the members of either house shall have been elected; *provided*, that an appropriation may be made for the payment of such actual expenses as members of the legislature may incur for postage, express charges, newspapers, and stationery, not exceeding the sum of sixty dollars for any general or special session, to each member; and, *furthermore provided*, that the speaker of the assembly and lieutenant governor, or president of the senate, shall each, during the time of their actual attendance as such presiding officers, receive an additional allowance of two dollars per diem." (Art. 4, sec. 33.)

The compensation of members of the legislature was fixed

by law, approved January 16, 1865. (Comp. L., sec. 2720.) The appropriation of money by the legislature, of which relator was a member, to compensate him for services as an officer of the senate in addition to his pay as senator, was, in effect, an attempt to increase his compensation during the term for which he was elected, and is obnoxious to the constitutional clause quoted. If relator be considered as an officer, only, of the senate, disassociated from his membership of the legislature, the controller would still be justified in his refusal to draw his warrant, for the reason that his compensation as such officer was not fixed by law prior to his election as president *pro tem.* of the senate.

Upon this point the constitution, at section 28 of article 4, says: "No money shall be drawn from the state treasury as salary or compensation to any officer or employee of the legislature, or either branch thereof, except in cases where such salary or compensation has been fixed by a law in force prior to the election or appointment of such officer or employee, and the salary or compensation so fixed shall neither be increased nor diminished so as to apply to any officer or employee of the legislature, or either branch thereof, at said session. * *

Mandamus denied.

[No. 1,036.]

D. AND B. LACHMAN, APPELLANTS, *v.* T. AND I. BARNETT, RESPONDENTS.

FORCIBLE ENTRY AND UNLAWFUL DETAINER—RIGHT OF POSSESSION NOT INVOLVED—ADMISSION OF DEEDS ERRONEOUS.—In an action of forcible entry and unlawful detainer, neither title nor right of possession being involved, it is erroneous to admit quitclaim deeds in evidence, as tending to show possession.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Haydon & Queen, for Appellants:

The deeds allowed in evidence were inadmissible for any

purpose; were quitclaims, and estopped no one. (18 Cal. 465; 16 Id. 103; 1 Saw. 238; 17 Cal. 51.)

Webster & Rankin, for Respondents:

I. The cases cited by appellants from California, are not in point on any theory of the case.

II. The evidence shows that the defendants expended money in making doors and windows in their buildings with reference to the use of the alleyway. On this theory the deeds were properly admitted in the limited form they are in evidence, for the purpose of showing affirmatively a license in the defendants to use the alley, and in connection with other evidence, as tending to show an executed license on the part of the defendants. (*Rerick* v. *Kern*, 14 Serg & R. 267–272; Adams' Eq. sec. 211.)

By the Court, BELKNAP, J.:

This is an action of forcible entry and detainer. The defendants, claiming an easement in a narrow strip of land alleged to be unlawfully withheld by them, introduced in evidence upon the trial, against plaintiffs' objections, two quitclaim deeds of premises embracing this strip. The elder deed was executed by defendants to one Becker; the junior one by Becker to plaintiffs, and each purported to reserve the easement. The deeds were admitted "as tending to show possession in the defendants and as characterizing their possession, and for no other purpose." The deeds did not show nor tend to show an actual possession in the defendants and were not admissible for such purpose. (*Sanchez* v. *Loureyro*, 46 Cal. 641.) Their tendency was to prove a right of possession in defendants, but that was a question that could not be litigated in this action.

The case was tried upon the theory and the jury were instructed that neither title nor right of possession was involved, but with the deeds before the jury we can not say that plaintiffs may not have been prejudiced.

The judgment of the district court is reversed and a new trial ordered.

Points decided.

[No. 1,007.]

I. B. MARSHALL ET AL., APPELLANTS, *v.* GOLDEN FLEECE G. & S. M. CO. AND T. K. HYMERS ET AL., RESPONDENTS, D. Z. YOST, INTERVENOR.

RIGHTS OF INTERVENOR—ANSWER.—Where the answer to a complaint is treated, upon the trial, as the answer to the petition for intervention, the case will be considered the same as if an answer to the petition had been filed.

IDEM—RELIEF GRANTED.—In such a case defendants can not complain because the relief granted exceeded the demand in the petition, if that which was granted was consistent with the case made, and was embraced within the issue.

RULES OF COURT MUST BE EMBODIED IN STATEMENT.—A rule of the district court relative to the settlement of a statement on motion for a new trial will not be considered by this court unless it is embodied in the statement.

PRESUMPTIONS—REGULARITY OF PROCEEDINGS.—In the absence of evidence to the contrary, every presumption is in favor of the regularity of the proceedings in the court below.

STATEMENT ON MOTION FOR NEW TRIAL—SETTLEMENT OF BY JUDGE OR REFEREE—PRACTICE.—In a case tried before a referee, where all the proceedings are reported to the court, the statement on motion for a new trial may be settled by the judge.

APPEAL—ORDER AMENDING RECORDS—REFUSAL TO DISMISS APPLICATION FOR NEW TRIAL.—An appeal can be taken from an order of court amending its records concerning the extension of time in which to file and serve statement on motion for a new trial and from an order denying a motion to dismiss the application for a new trial.

IDEM—AMENDMENTS DURING TERM.—A court may amend its orders of record concerning the extension of time given to file a statement, so as to conform to the truth, at any time during the term in which they are entered.

NEW TRIAL—RECORDS OF COURT—STATEMENT—TRIAL AND APPELLATE COURT.—The records of the court may be acted upon in the trial court on a motion for a new trial without being inserted in the statement; but, where there is no statement on appeal, the records of the lower court must be designated by the judge as having been read, or referred to, on the hearing, or put in the statement, or they will not be considered by the appellate court.

FINDINGS OF FACT—GENERAL AND SPECIAL VERDICT.—The findings of fact by a court or referee are like the special verdict of a jury; and the conclusions of law drawn therefrom are similar to a general verdict in a case wherein the jury have found a general and special verdict.

JUDGMENT MUST CONFORM TO THE ISSUES.—A judgment must accord with, and be sustained by, the pleadings of the party in whose favor it is rendered, and no court, jury, or referee has any authority to find a fact or draw therefrom a legal conclusion which is outside of the issues.

Argument for Appellants.

ACTION AGAINST TRUSTEES OF CORPORATION—SUFFICIENCY OF COMPLAINT—DEMURRER.—Upon a review of the pleadings in an action against the trustees of a corporation for levying unnecessary assessments with intent to defraud the stockholders, and to have the assessments declared null and void, and for other relief: *Held*, that the demurrer to the complaint was properly overruled; that the complaint stated a cause of action against the personal defendants; and that the corporation was a proper party defendant.

NEW TRIAL—FINDING OR DECISION OF COURT AGAINST LAW—PLEADINGS.—If the decision or finding of a court or referee is against law, a new trial is the proper remedy; the decision is against law if it is contrary to, or inconsistent with, the case made and embraced within the issue.

IDEM—FINDINGS NOT SUPPORTED BY THE PLEADINGS—LEVY OF ASSESSMENTS AND SALE OF STOCK AFTER COMPLAINT IS FILED.—When the complaint was filed, the sale of stock under the thirteenth assessment had not been made and the fourteenth assessment had not been levied. The referee found that these assessments would have been unnecessary if the trustees had faithfully administered the business of the corporation and faithfully used the funds realized by the twelve assessments previously levied, and that since the commencement of the suit the trustees had caused the stock of plaintiffs and intervenor to be sold on the thirteenth and fourteenth assessments. As conclusion of law the referee found that these two assessments were unnecessary; that they were made to defraud the stockholders; that they were fraudulent and void; and that plaintiffs were entitled to have them so declared, and to have the sales made thereunder set aside, etc.: *Held*, that the decision of the referee was not justified by the pleadings, and consequently that it was against law.

IDEM—SALE OF STOCK—WHEN NOT VOID.—If at the time the thirteenth and fourteenth assessments were levied the corporation had no funds, and these assessments were needed for legitimate purposes, the sales made thereunder would not be void for the reason that the trustees had previously misappropriated the funds of the corporation.

IDEM—AMENDMENT OF COMPLAINT AFTER FINDINGS ARE MADE—WHEN NOT ALLOWABLE.—When it is not affirmatively shown that the defendants had reason to believe that the affairs of the corporation, subsequent to the commencement of the action, would be inquired into with the view of arriving at a judicial settlement of the same, or that the case was tried upon that theory: *Held*, that the court, after the findings were made, properly denied plaintiff's application to amend their complaint so that it should conform to the findings of the referee.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

I. B. Marshall, for Appellants:

I. The court erred in granting a new trial. No affidavit

or statement was filed within five days after the filing of the notice for a new trial; and the time to file the statement not having been extended by the court or the plaintiffs, the right to move for a new trial was waived. (Sec. 197, 1 Com. Laws, 348; *Easterby* v. *Larco*, 24 Cal. 179; *Leroy* v. *Rassett*, 32 Id. 171; *Campbell* v. *Jones*, 41 Id. 515; *Killip* v. *Empire Mill Co.*, 2 Nev. 34; *State* v. *First National Bank of Nevada*, 4 Id. 358.)

II. The court also erred in granting a new trial for the reason that no statement whatever was settled according to law. It should have been settled by the referee and not by the judge of the court. (1 Comp. L. 1258; Rule 32 of District Court.) As the notice of motion for a new trial was filed and served April 23, 1879, the defendants had up to and including the twenty-eighth of April, 1879, to file their statement or to apply for an extension of time. They omitted to do either, thereby waiving their right to move for a new trial. (*Caney* v. *Silverthorne*, 9 Cal. 67; *Easterby* v. *Larco*, 24 Id. 179; *Leroy* v. *Rassett*, 32 Id. 171; *Campbell* v. *Jones*, 41 Id. 515; *Killip* v. *Empire Mill Co.*, 2 Nev. 34.) When the right to move for a new trial is waived, it can not be restored by an order of the court. (*Hegeler* v. *Henckell*, 27 Cal. 491, 494; *Thompson* v. *Lynch*, 43 Id. 483.) The plaintiffs and intervenor in their proposed amendment to defendants' statement, properly reserved their right to object to the statement, on the ground that it was not filed in due time. (*Cottle* v. *Leitch*, 43 Cal. 321; *Brundage* v. *Adams*, 41 Id. 619; *Quivey* v. *Gambert*, 32 Id. 304.)

III. The orders of the twenty-third of April, 1879, did not extend the time to file notice or statement on motion for new trial. (*B. R. & A. W. & M. Co.* v. *Boles*, 24 Cal. 354; *Ellsassar* v. *Hunter*, 26 Id. 279–282; *Easterby* v. *Larco*, 24 Id. 179; *Jenkins* v. *Frink*, 27 Id. 337; *Hegeler* v. *Henckell*, Id. 491; *Campbell* v. *Jones*, 41 Id. 518; *Thompson* v. *Lynch*, 43 Id. 483; *Shaw* v. *Randall*, 15 Id. 384.)

IV. The court did not have the power to amend the statement on motion for a new trial, after the judge had settled it and certified that it was correct. (*Lobdell* v. *Hall*, 3 Nev. 525.) The motion for a new trial rests entirely upon the

statement made and settled before the motion was heard. (*Quivey* v. *Gambert*, 32 Cal. 307.) Nothing can be recognized by this court as a statement except that which was certified to by the judge on the fifth of July, 1879, as having been allowed by him, and was correct. (*Cosgrove* v. *Johnson*, 30 Cal. 509.)

V. Upon the filing of the referee's report, it became the findings and decision of the court. (1 Comp. L. 189; *Peabody* v. *Phelps*, 9 Cal. 213; *Harris* v. *S. F. S. R.*, 41 Id. 393). And as the findings were not excepted to as defective or otherwise, the judgment can not be reversed on that ground. (1 Comp. L., sec. 2; *Jenkins* v. *Frink*, 30 Cal. 595; *Whitmore* v. *Shiverick*, 3 Nev. 312; *State* v. *Manhattan*, 4 Id. 318; *Warren* v. *Quill*, 9 Id. 259; *Young* v. *Clute*, 12 Id. 31.)

VI. If the facts put in issue and established by the evidence entitle the party to any relief in the power of the court to give, although not that demanded, it is the duty of the court to give it, and its power to do so is not conditioned upon the form of the prayer. (Bliss on Code Pl., sec. 161, 167; *Wood* v. *Brown*, 34 N. Y. 337; *Emery* v. *Pease*, 20 Id. 62; *Henderson* v. *Dicky*, 50 Mo. 161; *Rollins* v. *Forbes*, 10 Cal. 299; *Worrell* v. *Munn*, 38 N. Y. 137.)

VII. The demurrer to the complaint was properly overruled. (*Gale* v. *T. C. Water Co.*, 44 Cal. 43. *Spanagel* v. *Dellinger*, 38 Id. 283; *Heath* v. *Erie R. R. Co.*, 8 Blatch. 347; *Barnstead* v. *Empire M. Co.*, 5 Cal. 299; *Neall* v. *Hill*, 16 Id. 145; *Cogswell* v. *Bull*, 39 Id. 320; *Wright* v. *Oroville M. Co.*, 40 Id. 20; *Parrott* v. *Byers*, 40 Id. 614; Angell & Ames on Corp. 319, 320.)

VIII. The findings of a referee will not be set aside when the evidence is conflicting, or when the testimony of some of the witnesses, if credited, supports the findings. (*Brady* v. *Brown*, 20 Cal. 520; *Keeler* v. *Sutrick*, 22 Id. 471; *Muller* v. *Boggs*, 25 Id. 179; *Peck* v. *Vandenberg*, 30 Id. 11.) If any errors were committed by the referee, they were against and not in favor of the appellants.

IX. If the judgment of the referee is in any manner defective, then this court has full power to direct the entry of

such judgment as equity requires. (*Fusier* v. *Sneath*, 3 Nev. 120; Comp. L. 1400; *Ord* v. *McKee*, 5 Cal. 516.)

R. M. Clarke and *William Cain*, for Respondents:

I. The court had the undoubted right to amend its records during the term the orders were entered, for then the record is in the breast of the judge. (*Swain* v. *Naglee*, 19 Cal. 127; *DeCastro* v. *Richardson*, 25 Id. 49; *Hegeler* v. *Henckell*, 27 Id. 491; *Clark* v. *Strouse*, 11 Nev. 76; *Twist* v. *Kelly*, 11 Id. 377.)

II. The court did not err in refusing to dismiss defendants' application for a new trial "upon the ground" that the statement was not filed and served in time. (*Black* v. *Dean*, Oct. term, 1876, Supreme Court of California, not reported.)

III. The court did not err in refusing to allow plaintiffs to amend their pleadings so as to conform to the findings of the referee. (*Nevada County & S. C. Co.* v. *Kidd*, 37 Cal. 282.)

IV. Plaintiffs are bound by their allegations and prayer for relief, and where the facts alleged in the complaint may constitute two or more different causes of action and authorize different judgments, the prayer becomes significant and may determine the nature of the action. (*N. C. & S. C. Co.* v. *Kidd*, 37 Cal. 304; *Arlington* v. *Liscom*, 34 Id. 375; Story Eq. Pl., secs. 40, 41, 42; 1 Van. San. Pl., p. 360; 1 Comp. L. 1102; Bliss on Code Plead., sec. 164; *Corry* v. *Gaynor*, 21 Ohio St. 277; *Rome Exch. Bank* v. *Eames*, 1 Keyes, 588; *Swan* v. *Smith*, 13 Nev. 257.)

V. The court did not err in granting a new trial. The complaint failed to allege any specific acts of fraud or any particular items plaintiffs intended to rely on. *Castle* v. *Bader*, 23 Cal. 75; *Semple* v. *Hagar*, 27 Id. 166; *Kent* v. *Snyder*, 30 Id. 667; *O. & V. R. R. Co.* v. *Plumas Co.*, 37 Id. 363; *Douglas* v. *Brooks*, 38 Id. 670; *Mandeville* v. *Solomon*, 39 Id. 125.) And it is only for fraud that officers can be sued. 2 Hilliard on Torts, 401–404, and cases; *Arkenburgh* v. *Wood*, 23 Barb. 370; *Neall* v. *Hill*, 16 Cal. 150;

Peabody v. *Flint*, 6 Allen, 52.) And plaintiffs must not be guilty of gross laches in prosecuting their claims. (*Fuller* v. *Melrose*, 1 Allen, 166; 2 Story Eq. Jur., sec. 1520, note 3.)

By the Court, LEONARD, C. J.:

It is alleged in the complaint, herein, as follows:

The Golden Fleece company, one of the defendants, is, and since January, 1874, has been, a corporation duly incorporated and doing business under the laws of this state, having a capital stock of thirty thousand shares, of the nominal value of ten dollars each. It owns and was incorporated for the purpose of working and developing a certain mine in Washoe county, known as the "Golden Fleece mine."

Since about December 1, 1875, the corporate powers of said corporation have been exercised by a board of trustees, consisting of defendants Gallagher, Hymers, Lippman, Cohn, and D. Lachman, who now own, or claim to own, about twenty thousand shares of its capital stock, and have owned or claimed to own the same since November 16, 1875. Since February —, 1874, the officers of said corporation have been and are defendants Hymers, president; Lippman, secretary, and D. Lachman, treasurer, who have been and are a majority of the board of trustees. Plaintiffs are stockholders and the owners of five thousand shares of capital stock.

On or before November 16, 1874, said corporation, at its assessment sales, became the purchaser of fifteen thousand two hundred shares of its capital stock, by reason of the failure of outside parties to bid in the same and pay the assessment and costs thereon, and the stock so purchased belonged to said corporation, subject to the control of the remaining stockholders, who have never made any legal or equitable disposition thereof.

Between November 10, 1874, and April 10, 1875, the market value of the company's stock was from one dollar to five dollars per share. But notwithstanding its market value, of which the personal defendants had full knowledge, and be-

ing a majority of the trustees, and being the owners, or having the control of a majority of the shares of the capital stock, they entered into a fraudulent conspiracy to defraud the remaining stockholders out of said fifteen thousand two hundred shares so purchased by said corporation at assessment sales; and in pursuance of such conspiracy, while acting as a board of trustees of said company, and at a meeting of said board, on the sixteenth day of November, 1874, did fraudulently and unlawfully appropriate to their own use and benefit thirteen thousand five hundred shares out of said fifteen thousand two hundred shares of stock, and did cause the same to be issued to them in their names without the permission or consent of the remaining stockholders, and in order to make such issue, did fraudulently and unlawfully cancel thirteen thousand five hundred shares of the fifteen thousand two hundred shares so belonging to the stockholders of said company, and ever since have failed and refused, and do still fail and refuse to account to the remaining stockholders for said thirteen thousand five hundred shares or for the market value thereof at the time of such fraudulent appropriation, issue, and cancellation.

On and before November 16, 1874, plaintiff (Marshall) owned, and had standing upon the books of said company, three thousand five hundred shares of its stock, and subsequently, but during the same month, became the owner of eight hundred additional shares, and now owns, in his own name, four thousand one hundred shares, besides one thousand five hundred shares in the name of plaintiff Wilson. Between the time plaintiff Marshall became a stockholder and the commencement of this action eight assessments, aggregating ninety cents per share, were levied by the board of trustees, and prior to that time there had been levied five assessments, aggregating twenty-two cents per share, making in all thirteen assessments, and amounting to one dollar and twelve cents upon each share of the capital stock of said company.

Prior to the commencement of this action (as appears from the company's books) its total receipts from assessments and from the sale of property belonging to it amounted

to over thirty-one thousand dollars in gold coin, while its expenditures did not amount to more than twenty-one thousand dollars, leaving a balance of surplus funds belonging to said company of over ten thousand dollars, beyond its present liabilities.

Between May, 1874, and the commencement of this action defendants Gallagher, Hymers, D. Lachman, and Lippman constituted a majority of the board of trustees, but since about December 10, 1875, said board has consisted of said defendants and defendant Cohn, who, during their terms of office up to the commencement of this action, have had the entire management and control of all the business of said company. Although little, if any, labor has been done on the mine since August 10, 1875, still subsequent to that date, four assessments of ten cents per share each have been levied, three of which have been paid in full by plaintiffs, and the fourth, levied October 11, 1877, upon all of plaintiffs' stock, except three hundred and ten shares belonging to plaintiff Donahue, is now delinquent and is advertised to be sold to pay the delinquent assessment thereon and costs, and will be sold on the twenty-seventh day of December, 1877, unless said sale is restrained by order of this court.

The defendants last above named, constituting said board of trustees, and B. Lachman, since November 16, 1874, have had and now have standing in their names upon the books of the company twenty thousand shares of the capital stock thereof, all of which they claim to own and since said date have controlled. Having had control of a majority of the capital stock they have controlled the election of all the trustees, and have thereby fraudulently conspired to levy and collect fraudulent assessments from the remaining stockholders, and have levied and collected the same. They have fraudulently failed, neglected, and refused to pay the assessments due on the stock so held by them, and have levied such assessments for the purpose of obtaining money from the remaining stockholders, which money they have appropriated to their own uses and purposes; and also for the purpose of obtaining the ownership of the stock of the

remaining stockholders, by purchasing the same at delinquent sale, for the ostensible benefit of the company, and appropriating the same to their own use and benefit.

In pursuance of such unlawful conspiracy, and for such fraudulent purposes, defendants Gallagher, Hymers, Lippman, Cohn, and D. Lachman have levied and caused said last or thirteenth assessment to be levied, for the collection of which, all the stock standing on the books of said company in the names of plaintiffs (except the three hundred and ten shares of the plaintiff Donahue) is advertised to be sold as delinquent on the twenty-seventh day of December, 1877, as aforesaid. During the whole time said Lippman has held the office of secretary, he has failed to keep any cash book showing the receipts and disbursements of said company, with the intent to conceal from the remaining stockholders the fraudulent and unlawful acts hereinbefore set forth; and during the whole time, defendant D. Lachman, with like intent, as treasurer of said company, has failed to keep books of account showing the amount of moneys received by him from or on behalf of said company; such neglect and failure were in direct violation of the by-laws of the company, and were within the full knowledge of all the members of said board of trustees.

Said board of trustees caused said secretary and treasurer to fail and neglect to keep proper books of account, as aforesaid, for the purpose of concealing from the remaining stockholders the unlawful and wicked conspiracy hereinbefore set forth.

The rights and equities, claims and demands of the plaintiffs and the remaining stockholders, and in favor of said company, herein set forth, can not be enforced by suit brought in the name, and in behalf, of said company, for the reason that the control and management thereof is, and since October, 1874, has been wholly in the hands of defendants Gallagher, Hymers, Lippman, D. and B. Lachman, and Cohn, and plaintiffs are wholly unable to procure the bringing of a suit in the name of said company against the defendants above named.

All the misconduct, willful neglect, conspiracy, and

frauds, hereinbefore set forth, of said defendants, have only come to plaintiffs' knowledge within the last thirty days, and this action is brought by plaintiffs against defendants, on behalf of themselves and all other stockholders of said corporation, who may choose to come in and contribute to the costs and expenses of this action.

The thirteenth assessment levied, and under which the stock of plaintiffs is advertised to be sold, as aforesaid, is wholly unnecessary for the purposes of said company, but was levied by said defendants Gallagher, Hymers, Lippman, D. Lachman, and Cohn, for the sole purpose of obtaining the money to be derived therefrom for themselves and for their own uses and benefit.

Wherefore plaintiffs pray that the said defendants be perpetually restrained and enjoined from selling the said stock of plaintiffs as delinquent under the said assessment levied October 11, 1877; that during the pendency of this action, defendants Gallagher, Hymers, Lippman, D. Lachman, and S. Cohn, be restrained and enjoined from acting as trustees of said corporation; that they and B. Lachman be ordered to account for all receipts and expenditures of said corporation during the time they or either of them have had control of the same, and that a referee be appointed to take such account and report the same when ascertained; that all of said defendants last named be ordered to pay over to the said company any and all assessments upon their stock which may be found to be due and unpaid thereon; that upon the said accounting, if any surplus funds, over and above what are required to meet the existing liabilities and necessities of the company remain, the same may be distributed *pro rata* among the *bona fide* stockholders of said company; that said plaintiffs have judgment against defendants Gallagher, Hymers, Lippman, D. and B. Lachman, and S. Cohn, for the market value of one fifth of said thirteen thousand five hundred shares fraudulently appropriated, as aforesaid, by said defendants, to wit, thirteen thousand five hundred dollars, for costs, and for such other and further relief as to the court may seem just, and as equity and the nature of the case may require.

Defendants demurred to the complaint upon two grounds, namely, that there was a misjoinder of parties defendant, and that it did not state facts sufficient to constitute a cause of action. Demurrer was overruled and defendants answered, denying all allegations of fraud; or that they had fraudulently or otherwise appropriated any stock of the company; or levied any assessment or collected or disbursed any money, except for what appeared to them to be for the best interest of the corporation; or that they had not paid their full share of assessments and otherwise borne their proportion of the burdens of the corporation; or that they had taken any advantage of plaintiffs, by reason of owning a majority of the capital stock.

They admit that they are the owners of twenty thousand shares of stock, but deny that on the sixteenth day of November, 1874, the stock of the company had a market value of from one dollar to five dollars per share, or that it then or ever had any regular market value, except such sums as parties desiring to purchase chose to pay for the same.

They deny that on or before November 16, 1874, the corporation had purchased exceeding fourteen thousand six hundred shares, which are admitted to have been sold by orders of the board of trustees, alleged to have been regular and legal, and for a sum alleged to have been a reasonable and fair price therefor.

They admit that the amount of assessments collected before the commencement of this action was thirty-one thousand two hundred and fifty-five dollars, but allege that the expenses of the corporation paid by the board of trustees were thirty-seven thousand nine hundred and ninety-six dollars; that the thirteenth assessment was levied, and the stock advertised to be sold, in order to pay outstanding indebtedness of the company; and that without such sale defendants would suffer great loss and damage.

They also allege that the corporation defendant is, and for a long time has been, engaged in expensive litigation; that it has no other means of raising necessary funds than by levying assessments upon its stock, and if restrained from levying assessments and selling delinquent stock the defend-

ants will be unable to protect the interests of the corporation in said action and be subjected to expensive litigation on behalf of their creditors, and in danger of losing their property.

Subsequently D. Z. Yost filed his petition or complaint as intervenor against the same defendants, claiming to be the owner of fifteen hundred shares of stock, alleging the same facts, substantially, as are stated in plaintiffs' complaint, and praying for the same relief, except as to the amount claimed as his proportion of the market value of the thirteen thousand five hundred shares alleged to have been fraudulently appropriated by the personal defendants. No answer or demurrer to intervenor's petition was filed.

The cause was referred to a referee to take the testimony and report findings and judgment, which was done, and the judgment was entered as the judgment of the court. This appeal is taken from an order granting a new trial; from an order denying plaintiffs' and intervenor's motion to dismiss defendants' motion for new trial; from an order amending the records of the court, and from an order denying plaintiffs' and intervenor's motion to amend their complaints so that they should conform to the findings of the referee. We shall treat the intervenor as one of the plaintiffs, and consider his case the same as though an answer to his petition had been filed. No default was taken by him, and one of defendants' counsel admits in his brief that, the case was tried the same as if an answer had been interposed, and that the answer to the complaint was treated as the answer to the petition of intervention. Such being the case, defendants can not complain because the relief granted exceeded that demanded in the petition, if that which was granted was consistent with the case made and was embraced within the issue.

It is claimed that the court erred in granting a new trial, for many reasons; and first, because there was no statement settled according to law, it having been settled by the judge instead of the referee, who tried the cause. We are referred to no authorities upon this point, and can find none under a statute like ours. If there was a rule of court requiring

the statement to be settled by the referee, as stated by counsel for appellants, we can not know the fact, as the rule is not embodied in the statement. In the absence of evidence to the contrary, every presumption is in favor of the regularity of the proceedings in the court below. (*Allen* v. *Riley*, 15 Nev. 452; *Rutherford* v. *Pope*, 15 Md. 581; *Cherry* v. *Baker*, 17 Id. 77; *Scott* v. *Scott*, Id. 78.)

In applications for new trials, the statute provides that, after the statement and amendments thereto have been filed, in case the amendments are not accepted, "either party may have the statement settled by the judge or referee, upon two days' notice thereof to the other party;" and that, "when settled by the judge or referee, it shall be accompanied with his certificate that the same has been allowed by him, and is correct." (Comp. L., sec. 1258.)

Section 1393 provides that, the statement and amendments on appeal "shall be presented to the judge or referee *who tried or heard the case*," and it is claimed that, the words, "who tried or heard the case," are clearly implied in section 1258. The sections relating to statements on motion for new trials and those on appeal, are different parts of the same statute; still, they are entirely independent of each other. The subject-matter differs, and both are complete in themselves. The legislature has seen fit to declare, in one case, that the statement *may* be settled by the judge *or* referee, and in the other, that it *shall* be settled by the judge or referee who tried the case. When, as in this case, all the proceedings are reported to the court by the referee, it may be entirely proper for the court to settle the statement. We can not say the legislature did not intend precisely what the language used imports. To hold otherwise would necessitate an interpolation of words not required to complete the sense apparently intended, and the result would be judicial legislation.

It is also claimed that a new trial ought not to have been granted, because no statement or affidavit was filed within the statutory period; and this claim involves the questions whether or not the court erred in its order amending the records as hereafter stated, and in its order denying plaint-

iffs' motion to dismiss defendants' application for a new trial, from which orders appeals are taken. In considering these questions, the entire statement on appeal is before us, because the orders mentioned are appealable (*Calderwood* v. *Peyser*, 42 Cal. ,114), and, as before stated, appeals are taken therefrom. In fact, the only material matters contained in the statement on appeal, that are not in the statement on motion for new trial, are those appertaining to the amendment of the court's records.

Briefly stated, the facts affecting these questions are these: The judgment was entered April 22, and on the following day plaintiffs filed and served notice of referee's findings and judgment. On the same day defendants filed and served notice of motion for a new trial, and made two motions; and thereupon, as appeared by the clerk's minute book, the court ordered, first, "a stay of execution for five days, for the purpose of allowing defendants to file and serve notice for new trial;" and, second, "that a stay of execution be granted until May 20, 1879, to allow defendants to prepare, file, and serve statement on motion for new trial. On May 12, the court granted until May 30, inclusive, in which to file and serve the statement, and it was filed and served on that day. Plaintiffs filed amendments to the statement, reserving the right to object to it on the ground that it was not filed and served in time; and on July 5, 1879, it was settled by the judge. On August 11, following, plaintiffs moved to dismiss the application for new trial, on the ground just stated; and on the twentieth of August, that motion and the motion for new trial were heard together. At the conclusion of the argument, counsel for defendants "moved the court to amend the record concerning the extension of time in which to file and serve statement, so as to conform to the truth, by showing the order made April 23, was, in fact, an order extending the time to prepare and serve statement on motion for new trial." That motion was verbal. Whereupon the motion to amend the record and the motion for new trial were continued for further hearing until August 30. On August 23 plaintiffs' attorneys were served with written notice of

motion to amend record, but it contained no notice of intention to amend the statement. On the thirtieth of August the court heard testimony in relation to the nature of defendants' motion of April 23, and the order made thereon; and referring to its own recollection and conscience in the matter, said: "The application of defendants' counsel, made on the twenty-third day of April, 1879, was for an extension of time until May 20, 1879, in which to prepare, file, and serve statement on motion for new trial, and the order then made was for such extension of time for said purpose." And it was then ordered by the court that "the record be so amended as to read, 'to extend time to prepare, file, and serve statement on motion for new trial.'"

Without deciding whether it is so in fact, we shall consider the order of April 23, as entered by the clerk, and as put in the statement on motion for new trial, as one not extending the time to file statement, and we shall not stop to inquire whether the record could have been amended if the April term had expired; although there is high authority that it might have been done even in that case. (*Spanagel* v. *Dellinger*, 34 Cal. 481; *Frink* v. *Frink*, 43 N. H. 514.)

There is no doubt that a court may amend its records during the term in which they are entered. Under the statute (1875, 119) the court had power to adjourn or extend the April term over the time fixed by law for the commencement of another term. If it did so, it had authority to amend the record in question. In the absence of any showing to the contrary, we must presume in favor of the regularity of the proceedings and the correctness of the rulings of the court below. We conclude, therefore, that the April term was extended, and that upon the proofs, which were conflicting, and the knowledge and conscience of the court, the record was amended so as to conform to the truth, and that the court had authority so to do.

Second. Was the refusal to dismiss defendants' application for new trial error?

No other reason has been given against the correctness of the court's ruling than this: It is said, "The motion for new trial rests entirely upon the statement made and settled

before the motion is heard; and the order of April 23, as it appears in that statement, shows that the time for filing it was not extended until more than five days after notice of motion for a new trial had been given, and consequently the right to a new trial was waived."

The action of the court in amending the record before granting a new trial being upheld, it follows that the statement was in fact filed and served in time; and, in law, the amended record, by relation, became the record of the court's order from the time it was made. Such being the case, it must be admitted that any objection to the effect that it was not so filed and served is extremely technical, and ought not to prevail, unless the law, or the well-established rule of practice, justifies that result.

The statute in relation to new trials (Comp. L. 1258) provides that, "On the argument reference may also be made to the pleadings, depositions, and documentary evidence on file, testimony taken and written out by a short-hand reporter * * * and the minutes of the court. The statement thus used, in connection with such pleadings * * * and minutes of the court as are read or referred to on the hearing, shall constitute, without further statement, the papers to be used on appeal from the order granting or refusing a new trial. * * * To identify any depositions * * * or minutes of the court, read or referred to on the hearing, it shall be sufficient that the judge designate them as having been read or referred to, in his certificate to be for that purpose by him made thereon." We quote the above for the purpose of showing that certain things specified, and among them the records of the court, may be acted upon in the trial court on a motion for a new trial, without being inserted in the statement, and that the only reason why a subsequent designation by the judge is required is that this court, on appeal from the order granting or denying a new trial, may know upon what the court below based its order. When there is no statement on appeal, the records of the lower court, etc., must be so designated or put in the statement, or this court can not consider them; but when there is a statement on appeal from an order,

there is another method of bringing here the records and papers used on the hearing in the court below. The statute provides that, "On an appeal from an * * * order the appellant shall furnish the court with a copy of * * * the order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified by the clerk to be correct."

In this case, by a statement on appeal properly settled by the judge and certified by the clerk, appellants present not only a copy of the amended order, but also copies of all the minutes of the proceedings of the court showing upon what the court below acted in making the amendment, thus producing a record in this court concerning the matters in hand, which imports the same verity as a statement on motion for new trial, accompanied with the same records designated by the judge according to the statute. The court had a right to act upon its own records in making its order. But having amended them without amending the statement, so that it should conform thereto, it was necessary that the facts upon which the court acted should be presented to this court, according to the requirements of the statute. That was done by a statement on appeal from the several orders appealed from. (See dissenting opinion of Mr. Justice Sawyer in *Quivey* v. *Gambert*, 32 Cal. 318–322, and *Spanagel* v. *Dellinger*, 34 Cal. 476.)

It is next urged that the only method of correcting the errors complained of by respondents, and especially those upon which the court below based its order granting a new trial, was by an appeal from the judgment, and that they could not be reached by a motion for new trial. One of the statutory grounds for a new trial is, "Insufficiency of evidence to justify the *verdict* or other *decision*, or that it is against law." One of the grounds stated by respondents in their notice of motion for new trial is, that "the *decision* and *decree* are against law." It is fair to presume that the word "decision," in notice, was used in the sense in which it is used in the statute. It has been decided by the supreme court of California, and, we think, correctly, that "the terms 'verdict and decision,' as used in the statute,

are appositional; that what is predicated of one, is, also, of the other. There are two kinds of verdict—general and special. The first finds the law and the facts; the second, the facts alone. The findings of fact by a court or referee are like the special verdict of a jury; and the conclusions of law drawn therefrom are similar to a general verdict in a case wherein the jury have found a general and special verdict. It was decided in *Barnes* v. *Sabron*, 10 Nev. 248, that upon an application for new trial, under the statutory ground above stated, the court was authorized to decide whether the findings of fact sustained the judgment, and that its action in that regard could be reviewed by this court on appeal from an order overruling plaintiffs' motion for new trial. But the precise question there decided does not necessarily arise here, for in this case, if it be admitted that the findings of fact support the judgment, we are still met with this question: Is the decision of a court or referee against law, if its, or his, findings of fact and conclusions of law are outside of the issues raised, or the facts admitted, by the pleadings, when such findings and conclusions are followed by a judgment consistent with them, but inconsistent with the pleadings? If it is, it is the duty of this court to review the order granting a new trial in this case, as it was the duty of the court below to decide the question there. That a judgment must accord with, and be sustained by, the pleadings of the party in whose favor it is rendered is common learning; and no court, jury, or referee has any authority to find a fact or draw therefrom a legal conclusion which is outside of the issues. The statute is decisive of this question without reference to adjudicated cases. Section 1211 Compiled Laws provides that, "the relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Mr. Bliss, in his Code Pleading, says: "The pleader should bear in mind the language of the rule, and that he will not be entitled to any relief that the evidence alone shows him entitled to. It is

the rule in chancery, not affected by the code, that a party must recover according to the case made by the complaint, or not at all; '*secundum allegata* as well as *probata*.'"

In *Simmons* v. *Hamilton*, vol. 7, No. 23, p. 947, Pacific Coast Law Journal, it is said: "Upon the facts found, whether found by the finding of a court, or the report of a referee, or the special verdict of a jury, the court must decide the law of the facts before ordering judgment; and if its decision is contrary to, or inconsistent with, the pleadings in the case, or is, in any respect, contrary to law, a new trial should be granted." That was an appeal from an order granting a new trial. So, also, was *Martin* v. *Matfield*, 49 Cal. 44. There the appellants, in their notice of intention, put their motion upon the ground of "insufficiency of evidence to justify the *judgment*, and that it is against law." The court said that neither was a statutory ground. Mr. Justice Rhodes said: "The grounds of the motion should have been directed to the *finding*." * * * "As was stated in passing on the question of the sufficiency of the notice of the motion, this ground is objectionable, because it does not attack the *finding*." And in *Shepard* v. *McNeil*, 38 Cal. 74, where a new trial was granted "on the ground that the plaintiff has entered a personal judgment against defendants," the court said: "Besides, it is no ground for a new trial of the issues of fact, that the *judgment* is broader than the facts alleged and found would justify. Such an error in no way affected the *findings*. The error occurred in entering the *judgment* subsequent to the *findings*. It did not occur in the course of the trial, but afterward, and it is, therefore, not one of the grounds for a new trial. There is no complaint that the *findings* were incorrect in this particular. The point is not specified in the statement as a ground for new trial. If there was any error in entering the *judgment*, the defendants have their remedy by appeal from the judgment itself on the judgment roll. The order granting a new trial on the ground stated is erroneous."

From the foregoing, as well as upon reason, we conclude that, if the *decision or finding* of a court or referee is against law, a new trial is the proper remedy, and that the

decision *is* against law if it is contrary to, or inconsistent with, the case made and embraced within the issue.

It becomes necessary, then, to examine the complaint in connection with the findings. We agree with counsel for appellants that the demurrer to the complaint was properly overruled. It stated a cause of action against the personal defendants, and under the circumstances alleged, it was proper to make the corporation a party defendant. (*Heath et al.* v. *Erie R. R. Co.*, 8 Blatch. 393 *et seq.; Hodges* v. *N. E. Screw Co.*, 1 R. I. 340.)

The complaint was ambiguous and uncertain in many respects, but those faults were waived by failing to demur specially. It is not necessary, therefore, to decide whether or not the question as to the sufficiency of the complaint can be considered except on appeal from the judgment. Nor do we think it necessary to decide whether or not the court was correct in holding, from the structure of the complaint and the character of relief sought, that plaintiffs waived the alleged torts, and that the action as to the thirteen thousand five hundred shares of stock was for its value, ratifying the sale to the defendants.

In the complaint it is alleged that in pursuance of an unlawful conspiracy the personal defendants had levied the thirteenth assessment, for the collection of which plaintiffs' stock was advertised to be sold, and would be sold, if the sale was not restrained. When the complaint was filed the sale had not taken place under that assessment, and the fourteenth was not heard of. No amended or supplemental complaint was filed. As to the last assessment and the sales thereunder the pleadings are silent, and there is no allegation or intimation of fraud in relation thereto.

The stock of plaintiffs and intervenor was bought in under these assessments by the corporation.

Under such pleadings the referee found as facts that, "assessments thirteen and fourteen were wholly unnecessary, had the trustees aforesaid faithfully administered the business of the company and faithfully used the funds realized by the twelve assessments previously levied; and that, since the commencement of this suit, the aforesaid

trustees have caused the stock of plaintiffs and intervenor to be sold on aforesaid thirteenth and fourteenth assessments." There is no finding that the thirteenth and fourteenth assessments were unnecessary, in fact, when they were levied—but only that they would not have been necessary if the trustees had been faithful to their trusts.

As conclusions of law the referee found that, "these two assessments were unnecessary; were made to defraud the stockholders and in order to sell their stock or compel them to pay assessments; that they were only needed because the defendants had failed to pay their assessments on the stock held by them, or otherwise had converted the money so collected to their own use; that the two assessments were fraudulent and void; that plaintiffs were entitled to have them so declared, and all sales thereunder set aside and annulled, and all stock held in said company restored to its owners at the time of, and prior to, any sales under said assessments." The decree was entered accordingly.

It is hardly claimed by counsel for appellants that the issues made by the written pleadings justified the action of the referee; but it is said that the respondents introduced evidence in relation to assessments thirteen and fourteen, and thereby submitted an "implied" issue to the referee upon which it was his duty to find; that they defended the case upon the theory that the averments in the complaint were sufficient to authorize an investigation of the affairs of the company up to and including the sale under assessment fourteen, and that having taken the chances of introducing the evidence under the pleadings, they must abide the result. This theory of pleading finds no support in the statute, in adjudicated cases, or in reason. Pleadings are the formal allegations by the parties of their respective claims or defenses, and in the district court must be in writing: "Every pleading shall be *subscribed* by the party or his attorney." (Comp. L. 1114.) Civil actions are commenced by *filing* a complaint and issuing a summons (Comp. L. 1085); and "the complaint shall contain * * * a statement of the facts constituting the cause of action in ordinary and concise language." (Comp. L. 1102.)

"The court can not, properly, even by consent of parties, pass upon questions not raised by the written allegations of the pleadings." (*Boggs* v. *Merced M. Co.*, 14 Cal. 356; see *Swan* v. *Smith*, 13 Nev. 260; Bliss on Code Pleading, secs. 135, 138.)

It is undoubtedly the law that defective pleadings are sometimes cured by verdict or other decision. In *McAllister* v. *Howell* (42 Ind. 26), no replication was filed to an affirmative answer, and it was held that inasmuch as the cause had been tried without a replication, the answer should be deemed to have been *controverted* on the trial in the same manner as if a replication had been filed.

In *Smith* v. *Burns*, 8 Kan. 201, the court say: "We think the statement in the petition was defective, and should have been held so if it had been attacked at the proper time and in the proper manner. But the objection now comes too late. The petition was not defective because it failed to state some material fact, but it was defective because it stated a material fact in a defective manner. * * * It is a general principle of law that where a material fact is stated in a pleading, but stated defectively, the defect will be cured by a verdict of the jury or a finding of the court." The general doctrine is well stated in *Dickinson* v. *Hays*, 4 Blackf. 45: "The doctrine is now settled that if there is a cause of action stated, although it may be ambiguously, inaccurately, and defectively stated, yet a general verdict cures the defects, because it will be presumed that all circumstances, both in form and substance, necessary to complete the cause of action thus defectively stated, were proved at the trial. But where there is no cause of action stated, as in cases of this kind, if the contract or the consideration be entirely omitted, the omission is not cured, for the party could not be allowed to prove that which he had entirely omitted to state, and therefore no presumption in his favor could arise." (See *Barron* v. *Frink*, 30 Cal. 489.) Here no cause of action was stated, or attempted to be stated in relation to the fourteenth assessment, and as to the thirteenth there were no allegations except as above set forth.

But, aside from the law, it is far from true, judging from the record, that defendants defended the case upon the theory that the complaint was sufficient to authorize an investigation of the affairs of the company up to and including the sale under the fourteenth assessment. On page 110 of the transcript it appears that, "the defendants objected to any examination of the affairs of the company after the filing of complaint December 26, 1877," and thereupon the referee ruled that, "all transactions since filing of complaint will be rejected, except where embodying transactions before suit, and the items afterwards will be considered and treated as surplusage, incidentally connected with matters occurring before suit." No objection was made or exception taken to this ruling, which was undoubtedly correct, under the pleadings. Subsequently (page 379) defendants made the same objection, and a ruling was reserved. Again (page 111), plaintiffs objected to a question for the same reason. Again (page 256), plaintiffs objected to Exhibit L, as incompetent, and that all items in the account subsequent to the commencement of this suit should be disregarded. On page 258 defendants objected to questions upon same ground. It is true that some evidence was admitted concerning matters subsequent to December 26, 1877, but both parties had a right to think it would be considered as stated by the referee at page 111.

From a legal standpoint, what has been said concerning the two assessments, etc., is equally true in relation to the stock alleged to have been fraudulently appropriated. Defendants are charged with appropriating thirteen thousand five hundred shares only, while the referee found that they had appropriated fifteen thousand seven hundred shares, and in addition, had purchased for the company six thousand two hundred and forty shares at delinquent sales, making in all twenty-one thousand nine hundred and forty shares purchased before this suit was brought, while they were only charged with having purchased fifteen thousand two hundred shares. The sale of the entire fifteen thousand seven hundred shares was declared void, and plaintiffs were found entitled to recover the same for the company, except

such shares as had been restored to the company at subsequent delinquent sales. It was found that plaintiffs' and intervenor's title to six thousand five hundred shares was valid; that five hundred shares standing in the names of defendants on the twenty-first of November, 1874, by valid purchase, should be canceled as the source of title to the five thousand shares, and that all sales or transfers of any portion of said twenty-one thousand nine hundred and forty shares were void. In the particulars specified, especially, we think the decision of the referee was not justified by the pleadings, and consequently that it is against law.

In this connection it is proper to say also, that we are of opinion the referee erred in declaring the assessment of stock under the thirteenth and fourteenth assessments and sales thereunder invalid, because the trustees had previously misappropriated the funds, admitting that they did so. It was not disputed that the company had no funds, and that they were needed for legitimate purposes was not denied. Had the trustees become possessed of the stock in pursuance of a fraudulent conspiracy, equity would not permit them to enjoy their ill-gotten gains. But the company bought in the stock, and so far as the record shows, held it at the time of the trial. If the levy and sale were unlawfully made, they might be set aside under proper pleadings, perhaps, but we are unable to see that they were invalid under existing circumstances, because the trustees had previously misappropriated the company's funds, thereby causing the existing necessity. Had the trustees stolen the funds, the company's necessities would have been as urgent as they would have been if others had committed the theft, without the fault of the trustees. If other trustees had been elected immediately before the thirteenth assessment was levied, and finding an empty treasury, had levied the thirteenth and fourteenth assessments, and had sold delinquent stock thereunder to the company, in the absence of other purchasers, it would hardly be claimed that the sales would have been void, for the reason that previous trustees had misappropriated the funds of the company. If the trustees did what they are charged with doing, they

Points decided.

are responsible for their malfeasance, but the sales were not void because they supplied funds then required, which would not have been necessary if they had been faithful to their trusts. Finally, did the court err in denying plaintiffs' application to amend their complaint, so that it should conform to the findings of the referee? We are unable to say, and so was the court below, that defendants expected, or had reason to think that, the affairs of the company, subsequent to the commencement of the action, would be inquired into with the view of arriving at a judicial settlement of the same, or that the case was, in fact, tried upon that theory. The contrary plainly appears. Such being the case, it would have been an unwarrantable exercise of power to have permitted the amendment at the time it was asked. For the same reason we can not attempt to settle the rights of the parties from the facts before us, however desirable it may be to do so.

The orders appealed from are affirmed.

[No. 1,043.]

S. BUCKLEY, APPELLANT, *v.* ARMINA BUCKLEY, ADMINISTRATRIX OF THE ESTATE OF HENRY A. BUCKLEY, DECEASED, RESPONDENT.

MARRIAGE OF ADMINISTRATRIX OF AN ESTATE—EFFECT OF.—Defendant, prior to the trial, married J. V. Peers: *Held*, that this marriage extinguished her authority as administratrix of the estate, but did not deprive her of the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court.

IDEM—POSSESSION OF PERSONAL PROPERTY—PRESUMPTION.—At the time this action was commenced, defendant, as administratrix, had the right of possession to a band of sheep: *Held*, that her possession having been lawful while her authority as administratrix continued, the presumption is, nothing to the contrary appearing, that it continued lawful after her marriage, especially against a wrong-doer.

PARTIES TO SUIT—HUSBAND OF ADMINISTRATRIX—UNPREJUDICIAL ERROR. *Held*, that even if the court technically erred in refusing to make the husband of the administratrix a party defendant, it was an error that did not prejudice the rights of the plaintiff.

BOOKS OF ACCOUNT—WHEN ADMISSIBLE IN EVIDENCE.—A memorandum book kept by the deceased, which was shown to be principally in his

Argument for Appellant.

handwriting, and the entries made about the time when the transactions occurred, and the book one by which the deceased settled with parties with whom he had business: *Held*, admissible in evidence.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Upon the part of the defendant, among other things, a certain memorandum book was offered in evidence; defendant, who was the only witness as to the time when entries were made, gave testimony tending to show that the entries were made by Henry A. Buckley and witness, and principally in deceased Henry A. Buckley's life-time, and all of them at about the time the respective transactions occurred; that it was the book by which deceased settled with other persons with whom he had business; that witness knows the book and that it is Henry's book of accounts, in which he kept his dealings with other persons in his handwriting and in defendant's; that he was in the habit of making his entries generally when the transactions which they alluded to occurred; that defendant knows when entries were made in relation to the number of sheep received from plaintiff and as to number of sheep returned to him, and that defendant was present at the time such entries were made by Henry A. Buckley, and saw him make them; that entry dated November 12, 1870, was in Henry's handwriting, but defendant could not be sure she was present when this entry was made.

Lewis & Deal, for Appellant:

I. The marriage of defendant operated as a revocation of her authority. (1 Comp. L., sec. 536; 14 Mass. 295; 36 N. Y. 622.)

II. The court should have allowed the plaintiff to make defendant's husband a party. (5 Paige, 34.)

III. It was error to admit in evidence the memorandum book of Henry A. Buckley. (1 Greenl. Ev., sec. 119, n.; 4 Watts, 258; 9 Conn. 344, 348; 4 Yates, 341; 2 Bay, 173; 2 McCord, 328; 4 Id. 76.)

IV. The action is brought against Armina Buckley in-

dividually, and not in her capacity as administratrix. If the suit was intended to be against her in her official character, the action should have been against her, as administratrix. (6 N. Y. 168, 172; 2 Barb. 368; 22 How. 372; 6 Hill, 240; 4 Id. 136; 5 Wend. 36; 1 Wait's Pr. 470.)

William Cain, for Respondent:

I. It is immaterial whether this is an action against Armina Buckley personally or as administratrix. In neither case ought her husband be joined with her. If against her personally as a defendant, the action did not abate by her marriage. (2 Eq. Abr., sec. 4; *Doe* v. *Butcher*, 3 Mau. & S. 557; *Cooper* v. *Munchin*, 4 East, 521; *Quackenbush* v. *Leonard*, 10 Paige, 133; *Heller* v. *Rosselle*, 6 Hun, 631; *Rowe* v. *Smith*, 45 N. Y. 230; *Baum* v. *Mullen*, 47 Id. 577; *Alderson* v. *Bell*, 9 Cal. 321; *Wilson* v. *Wilson*, 36 Id. 447; Civil Pr. Act, secs. 7, 8.)

II. If sued as administratrix, her husband was not a proper party defendant, not being entitled to administer upon the estate in case of her disability. (1 Comp. L. 532.)

III. And she would be entitled to be treated for purposes of settlement and remedies as administratrix in office, notwithstanding her marriage. (*Rogers* v. *Hoberlein*, 11 Cal. 129.)

IV. She was sued as administratrix, the word "as" being omitted did not of itself make it an action against her personally. (Abbott's Trial Evidence, 55; *Merritt* v. *Seaman*, 6 N. Y. 168; *Smith* v. *Levinus*, 8 Id. 474; *Chouteau* v. *Suydam*, 21 Id. 183; 1 Estee's Pl. 239; *Buckley* v. *Buckley*, 9 Nev. 373.)

By the Court, LEONARD, C. J.:

This is the third appeal of this case. (12 Nev. 426; 9 Id. 373.) Prior to the last trial in the court below, the defendant married J. V. Peers, whose wife she was at the time of the trial. Before the jury was impaneled plaintiff moved the court for leave to file a supplemental complaint, alleging such marriage in August, 1876. The last trial was

in April, 1880. Defendant recovered verdict and judgment, awarding to her a return of two thousand and fifty sheep, or, in case a return could not be had, their value, fixed at three dollars per head, together with legal interest as damages, from November 5, 1873, the date of their seizure by plaintiff. Defendant testified that she married Peers in August, 1876; whereupon plaintiff again moved for leave to make him party defendant. The motion was denied, and plaintiff moved to strike out all the testimony given for defendant, upon the ground that it was irrelevant and immaterial, and did not tend to show any right in the defendant to a return of the property, she having married since the bringing of this suit. That motion was also denied.

The court instructed the jury as follows: "As it is admitted that the plaintiff leased the sheep in question to Henry A. Buckley, now, so far as the defendant claims that the said Henry A. Buckley afterwards obtained title to a part or the whole of the said sheep, by means of an exchange or trade of sheep, the burden of proof is on the defendant, and before you can legally find in her favor as to the acquiring of title by such exchange or trade, that fact must be established by a preponderance of the evidence admitted in the case for your consideration; and unless such exchange or trade is established by a preponderance of evidence in the case, you must find for plaintiff as to such sheep so claimed by defendant to have been so acquired by Henry A. Buckley."

Upon that instruction the jury found as above stated; and there is ample testimony to support the finding that, the title became vested in Henry A. Buckley, and, consequently that plaintiff had no right to the possession of the property, whether the defendant after her marriage had such right or not. Defendant's marriage undoubtedly extinguished her authority as administratrix; but it by no means follows from that fact that, she had not the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court. One of her most important duties was to account for all the property

of the estate which had come into her possession; and for a failure so to do she is liable. From the verdict of the jury the plaintiff had no more right to the possession of this property than any other stranger. His taking and detention were wrongful, although he observed the forms of law in so doing.

At the time this action was commenced, the defendant had the right of possession, by reason of her duty as administratrix to take control of the property of the estate; and at the time of trial, so far as the record shows, she was still entitled to its possession, because of her responsibility to the estate. Her possession having been lawful while her authority as administratrix continued, nothing to the contrary appearing, the presumption is that it was lawful after her marriaga, especially as against a wrong-doer. (Wells on Replevin, 69, 71.) Having no rights in the property, plaintiff's duty was to return it to defendant's rightful possession, to be accounted for by her as required by law. This much is true upon the supposition that she had merely a special property in the sheep, by reason of her former official capacity, and her liability to the estate, in case of failure to account for them according to law, while, if she had a general property in them, because of her relation to Henry A. Buckley, that was another reason for awarding the right of possession to her. Besides, if the court erred, technically, in denying the motion to make Peers a party defendant, a question we shall not consider, it was an error that in no sense prejudiced the rights of plaintiff. If he had been made a party, the result, as to him, must have been the same. The jury would still have said that he had no rights in the property in dispute.

We are of opinion, also, that the preliminary proof was sufficient to justify the court in admitting in evidence the several entries contained in Henry A. Buckley's memorandum book. (*Buckley* v. *Buckley*, 12 Nev. 442.)

Finding no error in the record, the judgment and order appealed from are affirmed.

Argument for Appellant.

[No. 1,033.]

W. C. GASS, APPELLANT, *v.* J. C. HAMPTON, RESPONDENT.

TRANSFER OF CERTIFICATES OF MINING STOCK—WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING TITLE.—G. deposited with the Bank of Virginia certain certificates of mining stock which were issued, in the usual form, in the name of different parties, and indorsed by them, as trustees, to be held as collateral security for any indebtedness that then existed, or might thereafter be incurred, by reason of any purchase or sale of stock that the bank might make for G. Subsequently the bank, without the knowledge or authority of G., delivered these certificates of stock, with others, to H. as collateral security for the payment of a loan made by him to the bank and for any further advances that might be made. H. had no knowledge that G. was the owner of the stock: *Held*, that G. could not recover the value of these certificates of stock against H., who received the same in good faith, believing them to be the property of the bank.

IDEM—INDICIA OF OWNERSHIP.—A party who places another in a position to enable him to commit a fraud, should suffer the loss rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

F. M. Huffaker and *M. N. Stone*, for Appellant:

I. The stock in controversy is personal property, and the owner can follow it and recover the possession of it wheresoever found. (1 Hittell's Code and Stats. Cal., sec. 5324; 2 Comp. L., sec. 3397; *Mechanics' Bank* v. *N. Y. & N. H. R. R. Co.*, 13 N. Y. 623; *Weston* v. *Bear River M. Co.*, 5 Cal. 189; *Hawly* v. *Brumagin*, 33 Id. 399; *Atkins* v. *Gamble*, 42 Id. 99; *Brewster* v. *Levin*, Id. 147; *Boylen* v. *Huguet*, 8 Nev. 353; *Bercich* v. *Marye*, 9 Id. 315; *Brookman* v. *Rothschild*, 6 Eng. Ch. 153; Pars. Cont., note.)

II. The bank held the stock as agent or broker of plaintiff, consequently with no power of disposition of it, except by direction of plaintiff, therefore no authority to pledge it for a debt of its own, and any such pledge conveyed no title to the pledgee as against the owner. (Dunlap's Paley on Agency, 213; *Patterson* v. *Tash*, 2 Stra. 1178; *Daubigny* v.

Duval, 5 T. R. 604; *De Bouchout* v. *Goldsmid*, 5 Ves. Jr. 211; *Urquhart* v. *McIver*, 4 Johns. 103; *Van Amringe* v. *Peabody*, 1 Mason, 440; *Kinder* v. *Shaw*, 2 Mass. 398; *Odiorne* v. *Maxcy*, 13 Id. 181; *Jarvis* v. *Rogers*, 15 Id. 398; *Newbold* v. *Wright*, 4 Rawl. (Penn.) 195; *Queiroz* v. *Truman*, 3 Barn. & Cress. 342; *Stevens* v. *Wilson*, 6 Hill, 513; *Learoyd* v. *Robinson*, 12 M. & W. 745; *Rodriguez* v. *Heffernan*, 5 Johns. Ch. 429; Story on Bailments, secs. 325–6; *Hoffman* v. *Noble*, 6 Metc. (Mass.) 74; *Warner* v. *Martin*, 11 How. (U. S.) 209; *Holton* v. *Smith*, 7 N. H. 446; Story on Agency, sec. 113, note 5; *Beach* v. *Forsyth*, 14 Barb. 499; *Blackman* v. *Green*, 24 Vt. 17; *Benny* v. *Pegram*, 18 Mo. 191; *Fulnestock* v. *Baily*, 3 Metc. (Ky.) 48; 2 Kent's Com. 625; Edwards on Bailm. 214; *McCombie* v. *Davies*, 6 East, 538; *Wright* v. *Solomon*, 19 Cal. 64; *Putnam* v. *Lamphier*, 36 Id. 158; *Hamilton* v. *Kennedy*, 59 Tenn. 476; *Everett* v. *Saltus*, 15 Wend. 474.)

III. The Bank of Virginia having possession of this stock had no authority to dispose of it to another, since possession alone does not confer title to personal property, being no indication of ownership. (*Brewster* v. *Sime*, 42 Cal. 147; *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 329; *Covill* v. *Hill*, 4 Denio, 323; *Ballard* v. *Burgett*, 40 N. Y. 314; *Cushman* v. *Thayer Man. Co.*, 76 Id. 370, *et seq.*; *Weaver* v. *Barden*, 49 Id. 287.)

IV. Defendant receiving this stock of the manager of the Bank of Virginia, and out of the usual course of the business of the bank, which was to buy and sell stock for its customers in the San Francisco market, acquired no title to it as against the plaintiff, the owner. (*Saltus* v. *Everett*, 20 Wend. 276; *Dame* v. *Baldwin*, 8 Mass. 518; *Wheelwright* v. *Depeyster*, 1 Johns. 479; *Hasach* v. *Weaver*, 1 Yeates, 478; *Easton* v. *Worthington*, 5 Serg. & R. 130; *Browning* v. *Magill*, 2 Har. & J. 308; *McGrew* v. *Browder*, 7 Mart. (La.) 17; *Roland* v. *Gundy*, 5 Ohio, 202; *Lance* v. *Cowan*, 1 Dana (Ky.), 195; *Ventress* v. *Smith*, 10 Pet. 161; *Hoffman* v. *Carow*, 22 Wend. 318; *Putnam* v. *Lamphier*, 36 Cal. 158; *Treadwell* v. *Davis*, 34 Id. 606; *Lyle* v. *Barker*, 5 Binn. 457; *Heyden & Smith's case*, 6 Co. 486; *Ingersoll* v. *Vanbokkelin*, 7 Cow. 670; *Pomeroy* v. *Smith*, 17 Pick. 85.)

V. The judgment in this action deprives the plaintiff of his property without his consent and without due process of law, and is therefore erroneous. (*Covill* v. *Hill*, 4 Denio, 327; *Silsbury* v. *McCoon*, 4 Id. 332; *Wilson* v. *Little*, 2 Coms. 443.)

VI. The defendant took this property from an agent, out of the usual course of business of said agent, which defendant at the time knew or was put upon such inquiry as to charge him with notice. (*Berry* v. *Anderson*, 22 Ind. 36; *Davenport* v. *Peoria Ins. Co.*, 17 Iowa, 276.)

VII. The principle of estoppel *in pais*, on which the case of *Stone* v. *Marye* was decided, does not apply to this case, and the plaintiff has done no act by which defendant was induced to act with reference thereto, and on the faith of which he did act, which is absolutely essential to constitute an estoppel, which can never be invoked in favor of one who deals with an agent out of the usual course of business of such agent. (*Holbrook* v. *N. J. Zinc Co.*, 57 N. Y. 616; Bigelow on Es. 345, 437; *People* v. *Brown*, 67 Ill. 435; *Stevens* v. *Dennett*, 51 N. H. 324; *Cushman* v. *Thayer M. Co.*, 76 N. Y. 370.

C. H. Belknap, for Respondent:

The plaintiff having allowed the Bank of Virginia to appear as the true owner of the certificates of stock, is estopped from asserting his title to the same as against defendant, who had no knowledge of his claim. (*Brewster* v. *Sime*, 42 Cal. 139; *Thompson* v. *Toland*, 48 Id. 99; *Crocker* v. *Crocker*, 31 N. Y. 507; *McNeil* v. *Tenth Nat. Bank*, 46 Id. 325; *Moore* v. *Metropolitan Nat. Bank*, 55 Id. 46; *Holbrook* v. *N. J. Zinc Co.*, 57 Id. 616; *Stone* v. *Marye*, 14 Nev. 362.

By the Court, HAWLEY, J.:

This is an action of claim and delivery for certain mining stocks. The material facts are as follows: On or about the twelfth of August, 1879, Gass deposited with the Bank of Virginia, a corporation engaged in the business of buying and selling mining stocks on commission, certain certificates of stock, of which he was the owner, for safe keeping.

These certificates of stock were in the usual form, and were issued in the name of different parties, and indorsed by them as "trustees." Within a short time after the deposit was made, Gass became indebted to the bank for money loaned and advanced, and for interest and expenses in the purchase and sale of mining stocks, and requested the bank to hold the certificates as collateral security for the payment of any indebtedness that then existed, or might thereafter accrue to the bank, by reason of any purchase or sale of stock that he might desire to make.

On the fourteenth of August, 1879, the firm of J. C. Hampton and Co., of which defendant is a member, advanced and loaned to the Bank of Virginia, in addition to other money then due from it, the sum of two thousand dollars, and in consideration of said loan the bank, without the knowledge or authority of Gass, within a day or two thereafter, delivered the stock, which belonged to Gass, to J. C. Hampton & Co., as collateral security for the payment of said loan and the other indebtedness then due, or by reason of their business transactions of like character thereafter to become due.

At the time of these transactions it was the custom in Nevada and in California to deal in mining stocks and transfer certificates by indorsement in the manner in which the certificates in question were indorsed.

Neither Hampton nor the firm of which he is a member had any notice or knowledge of the ownership or claim of Gass to said certificates of stock until some time after the failure of the bank, when Gass tendered to Hampton the amount he owed the bank, and demanded the stock, and upon the refusal of Hampton to deliver it this suit was brought for its recovery. At the time the demand was made the certificates were held by J. C. Hampton & Co. as security for the indebtedness of the bank to said firm, which exceeded the value of all stocks held by them, and exceeded the amount that could be realized by a sale of the stocks.

Upon the facts, as found by the court, and sustained by the evidence, we are unable to distinguish this case from

that of *Stone* v. *Marye*, 14 Nev. 362, in so far as the application of the legal principles therein announced are concerned.

Hampton was a stranger to the business operations of the bank. He made no inquiry, and the law did not, upon the facts presented, require him to make any inquiry, whether it was depositing its customers' stocks or its own. The bank had the right to pledge its own stocks for its individual debt, and a transaction of this kind is not outside of the usual course of business. There was nothing in the mere fact of depositing this stock as collateral security with Hampton & Co. to put them upon inquiry as to the ownership of the stocks. There was nothing upon the face of the certificates to raise a suspicion that they were not the property of the bank. There is nothing in the record to show that Hampton & Co., or Hampton, knew, or ought to have known, that the bank did not own the stock, or that Gass, or any person other than the bank, did own it. The record does, affirmatively, show that Hampton & Co. received the certificates in good faith, without any notice or knowledge of the claim or ownership of Gass.

When Gass deposited his stock he knew, or ought to have known, that it was the custom of brokers to transfer certificates of stock that were indorsed in the manner his were by delivery.

By his own voluntary act he left his certificates of stock with the bank in such a condition as to pass by delivery, with nothing on their face to indicate that he had any interest in them, or that they were not the property of the bank, and thereby enabled it to treat the certificates as its own, and to wrongfully obtain the loan of money thereon from parties innocent of the true state of the title. He clothed the bank with such an apparent ownership as to enable it to mislead the public and to hold itself out to the world as the true owner, and thereby to defraud innocent persons dealing with it in good faith.

Under these circumstances the case comes clearly within the principle, announced in *Toland* v. *Thompson*, 48 Cal. 112, that "the party who places another in a position to

enable him to practice the fraud should suffer the loss rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him.".

If Gass had desired to protect his rights against the use which the bank might make of his stock, he should—as he readily could—in some proper method, have placed it out of the bank's power to deal with the stock as its own. It is to be presumed, from his acts, that he selected the bank because he had confidence in its managers, and did not believe they would wrongfully use his property. He reposed his confidence in the bank. To it he must look for redress. He can not now, upon any principle of equity, be allowed to hold an innocent party responsible for the loss which resulted to him from the improper and wrongful act of the party in whom he confided.

Counsel for appellant have cited numerous authorities to show that certificates of mining stock are personal property, and non-negotiable; that no person can transfer any other interest in personal property than he, or his principal for whom he acts, is possessed of; that no person can be divested of his property without his own consent, and that an honest purchaser, under a defective title, can not hold the property against the true owner. As a general proposition these "fundamental principles" are unquestionably correct. The bank had no right to hypothecate the stock without the consent of Gass, and it must be conceded that as a general rule, applicable to personal property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. This principle applies to transfers from one party to another where no other element intervenes. But this rule does not, as was said by the court of appeals in *McNeil* v. *The Tenth National Bank*, 46 N. Y. 329, "interfere with the well-established principle that where the true owner holds out another, or allows him to appear, as the owner thereof, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title

or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." The fact, apparently relied upon by appellant's counsel, that the stock "did not stand on the books of the company in the name of the bank of Virginia, nor had the bank of Virginia title by assignment from Gass, the owner," "nor did the bank have any power of attorney from plaintiff, the owner, to have the same transferred or to dispose of it in any way," or that "Gass did not deposit this stock with the bank of Virginia, to secure an account he owed it, with a blank assignment and power of attorney signed by him," do not distinguish this case in principle, from those cited in *Stone* v. *Marye.*

The bank had the same absolute power to hypothecate the certificates, indorsed by the respective trustees to whom the same were issued, as it would have had if the stock had been issued in its own name, or to Gass, and by him assigned to the bank. In the condition in which the certificates were left with the bank, it could, at any time, have caused the certificates to be transferred on the books of the respective corporations in its own name, and any purchaser or pledgor could have done the same. By the act of Gass the bank was clothed with the usual *indicia* of the ownership of mining stock, and the real point of inquiry here, as it was in *Stone* v. *Marye*, is whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over, the certificates of stock as to estop him from asserting his own title as against parties who took *bona fide* through the brokers.

The cases of *Brewster* v. *Sime*, 42 Cal. 139; *Thompson* v. *Toland*, *supra*, and *McNeil* v. *The Tenth National Bank*, *supra*, upon the authority of which *Stone* v. *Marye* was decided, were cases concerning stock transactions that can not, in the application of legal principles, be distinguished from the case at bar.

The same principle was applied in the Pennsylvania Rail-

road Company's appeal by the supreme court of Pennsylvania. The executrix of an estate took certain certificates of stock, with blank power of attorney signed on the back, in the railroad company, and deposited them for safe-keeping with one Creeley, who, at that time, was a lawyer in good standing, and was acting as the legal adviser of the executrix, and had been for several years collecting the dividends of the estate.

Creeley secured a loan for himself from an innocent party, and pledged the certificates of stock as collateral security therefor, without the knowledge or consent of the executrix. The loan was not paid, and the party who held the certificates of stock as collateral security took them to the office of the railroad company and had the stock transferred to himself, and he subsequently disposed of the same. The executrix sought to hold the railroad company liable upon the ground that it was negligent in not making inquiries as to the true ownership of the stock. The court, in deciding the questions raised upon this branch of the case, said:

"But there certainly was negligence on the part of the appellee. As executrix she placed the certificates in the hands of Creeley, as her attorney, with the blank powers indorsed uncanceled. Thus by her act he was enabled to commit this fraud. The equities of the respective parties are not equal. Where one of two parties, who are equally innocent of actual fraud, must lose, it is the suggestion of common sense, as well as of equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. As Judge King has well expressed this principle in *The Bank of Kentucky* v. *Schuylkill Bank* (1 Pars. Eq. 248): 'The true doctrine on this subject is that, where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act.' The appellee in this case selected the attorney. She had entire confidence in him. She placed these certificates, with the blank powers, in his hands. He proved unworthy of the trust reposed in him.

He perpetrated a gross fraud, by which he converted this property to his own use. That he was an attorney-at-law in good standing does not help her case. He added to the crime of which he was guilty that of moral perjury by the violation of his official oath. On what principle of equity can she be allowed to throw off from herself on to the appellants the loss which has resulted from the dishonesty of her own agent? This important element in the case was entirely overlooked by * * * the court below; and we think, applying it to the undisputed facts of the case, the appellee's bill as to the appellants ought to have been dismissed." (86 Penn. St. 83.)

The facts do not show, as appellant claims, that the certificates in controversy were delivered to Hampton & Co. as security for the payment of an antecedent debt due from the bank to them, and the authorities cited upon this point have no application to this case.

The judgment of the district court is affirmed.

BELKNAP, J., having been of counsel at the trial of this cause in the lower court, did not participate in the foregoing decision.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

JULY TERM, 1881.

[No. 1,060.]

JACOB KLEIN, APPELLANT, *v.* JOHN H. KINKEAD, GOVERNOR, ET AL., RESPONDENTS.

STATUTE TO EMBRACE BUT ONE SUBJECT—SECTION 17 OF ARTICLE IV. OF THE CONSTITUTION CONSTRUED.—*Held*, that the general purpose of section 17 of article IV. of the constitution, that "each law shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," is accomplished when a law has but one general object which is fairly indicated by its title.

IDEM—STATUTE 1881, 59, CONSTRUED—CARE OF INSANE.—The "act to provide for the taking care of the insane of Nevada" provides for the construction of an asylum; that the money appropriated for that purpose shall be taken from the state school fund, and in its place there shall be deposited state bonds, bearing interest, etc., and provides for the levy and collection of a tax to meet the payment of said bond: *Held*, that the act embraces but one subject, the care of the insane, which is fairly expressed in its title.

IDEM.—The different steps by which the result is to be accomplished are not different subjects, but minor parts of the same general subject.

BONDED INDEBTEDNESS OF STATE—SECTIONS 2 AND 3 OF ARTICLE IX. OF THE CONSTITUTION CONSTRUED.—In construing these provisions of the constitution: *Held*, that the object in authorizing a bonded indebtedness was to enable the state to maintain its business upon a cash basis, and that the legislature has the power to direct the issuance of bonds at any time, so long as it does not conflict with the limitation as to the amount

IDEM—AMOUNT OF INDEBTEDNESS.—In construing the various statutes relative to the territorial indebtedness: *Held*, that the act in question does not contemplate an indebtedness in excess of that authorized by the constitution.

IDEM—SCHOOL FUNDS—SECTION 3, ARTICLE XI., CONSTITUTION.—Under section 3, article XI., of the constitution, the legislature is commanded to invest certain moneys received for educational purposes in United States bonds or the bonds of this state: *Held*, that the issuance of the bonds provided for in the act in question is not an evasion of the investment directed by the constitution.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

C. S. Varian, for the Appellant:

I. The title of the act does not embrace the subject of sections 11 and 12. The act embraces more than one subject. Neither the purpose to make a state loan and public debt, nor to invest school moneys, is indicated by the title. It may be that members of the legislature who voted for the bill, as well as the people lured into security by its title, although willing to provide for the insane, would have found good and convincing objection to the contracting of a public debt, or the diversion of school moneys by a misnamed investment for such purpose. The ordinary mode of raising money to conduct and maintain the public business is by taxation. The question of contracting a public debt involves grave considerations of necessity and public policy. The rate of interest and time of payment, together with the taxation required to meet the obligation, all present questions of great interest to the people, and upon which they are entitled to be heard. This is also true of the question of investing school moneys. There is a general law on the statute book giving the management and control of school moneys to a state board of education. (2 Comp. L. 3322.) There is no language in the title of the act which is elastic enough to include the purposes and subjects embraced in sections 11 and 12. The courts can not enlarge the scope of the title. The constitution has made the title the conclusive index to the legislative intent as to what shall have

operation. (*Mewherter* v. *Price*, 11 Ind. 199; *State* v. *Kinsella*, 14 Minn. 524; *Gaskin* v. *Meek*, 42 N. Y. 186; *People* v. *Allen*, Id. 404; *People* v. *Hills*, 35 Id. 449; *People* v. *O'Brien*, 38 Id. 193; *Ryerson* v. *Utley*, 16 Mich. 269; *Cutlip* v. *Sheriff*, 3 W. Va. 588; *People* v. *Futher M. Society*, 41 Mich. 67; *Shepherd* v. *Helmers*, 23 Kan. 507; *State* v. *Silver*, 9 Nev. 227.) Three subjects are embraced in the law: 1. Providing for the insane; 2. Providing for a state loan; 3. Providing for the investment of school funds.

II. The loan authorized is not "for the purpose of enabling the state to transact its business upon a cash basis." (Secs. 2, 3, art. IX., Con.; sec. 1, art. XII., Con.) If building an insane asylum is to be considered as a part of the ordinary business of the state, the expense of doing so should be defrayed in the ordinary way out of the annual revenue. No necessity exists for the creation of a public debt to build an asylum. The power to contract such a debt is limited to the purpose "of enabling the state" to do its business. If it already has the power and is able in another and the usual way to carry out its purpose, the constitutional provision does not apply. Eliminating sections eleven and twelve from the law, and there still remains an appropriation to carry it into effect. As an appropriation in anticipation of revenue, it is within the power of the legislature and can be made effective. (Const. Debates, 754–756, 762 *et seq.*, 879; *Ash* v. *Parkinson*, 5 Nev. 15; Const., sec. 2, art. IX.; *State* v. *School Fund*, 4 Kan. 269.)

III. These sections authorize and direct the creation of a public debt in the sum of eighty thousand dollars, and the public debt of the state now exceeds the sum of three hundred thousand dollars. The territorial debt is wiped out by payment. (Stat. 1871, 81; 1873, 94; 1877, 191; 1879, 15; Const., art. XVII., secs. 7, 24.) The constitution does not say that upon payment of that debt, the state may go on forever, under pretense of revivifying it under different forms and names, and contract debts equal in amount to those paid. What it does say is that the assumption, *i. e.*, the undertaking to pay the old debt, shall not prevent the state from contracting the additional indebtedness.

(*People* v. *Johnson*, 6 Cal. 499; *Nougues* v. *Douglass*, 7 Id. 65; *Rodman* v. *Munson*, 13 Barb. 188, 63; *Scott* v. *Davenport*, 34 Iowa, 208; *State* v. *School Fund*, 4 Kan. 270.)

IV. These sections direct the diversion and transfer of the moneys pledged to educational purposes to another fund and for other purposes, and are unconstitutional. (Art. XI., sec. 3.) To preserve the fund it is apparent that all investments must be made in securities that some time or other can be made available to repay the money. To invest moneys in bonds means to loan them, so that they will produce returns by way of interest, and upon the expectation of realizing the principal upon the maturing of the bonds. The bonds of a state or of the general government are, within the contemplation of our constitution, always negotiable in open market. When such bonds are once upon the market they are the subject of purchase and sale, *i. e.*, of investment; and it is in this sense only that the moneys belonging to the school fund can be "invested" by the trustees of the fund. It is vain to attempt to fritter away the express provisions of the constitution by contending that the words "investment" and "bonds" have any other meaning than that known to commerce and the business world everywhere. By "state bonds" is meant something of value for purchase, investment, and income; not to the debtor state, but to the creditor capital, which owns it. There is no security in a paper never delivered by a state, and which remains in the vaults of its treasury. The power of the state is limited to an investment in constitutional bonds, already on the market, containing an obligation to pay some one, a sum certain and at a time certain, and secured by a revenue provided by authority. (*State Treasurer* v. *Horton*, 6 Kan. 354.)

Lewis & Deal, for Respondents:

I. The act in question embraces but one subject and matters properly connected therewith, which subject is briefly expressed in the title. (Sec. 17, art. IV., Const., is mandatory; *State* v. *Silver*, 9 Nev. 231.) In the construction of the provisions of this section in state constitutions the courts have adopted a liberal rule in favor of their

validity. (*State* v. *Ah Sam*, 15 Nev. 27; *Murphy* v. *Menard*, 11 Tex. 673; Cooley's Const. Lim. 146; *Sun Mutual Ins. Co.* v. *New York*, 4 Seld. 241; *Brewster* v. *City of Syracuse*, 19 N. Y. 117; *People* v. *Mahaney*, 13 Mich. 495.) When the title of an act expresses a general purpose or object, all matters fairly and reasonably connected with it, and all necessary measures which will facilitate its accomplishment, are proper to be incorporated in the act, and are germane to its title. (*People* v. *Briggs*, 50 N. Y. 562; Sedg. on Stats. 41; *People* v. *Banks*, 67 N. Y. 572; *People* v. *Brinkerhoff*, 68 Id. 265; *Kerrigan* v. *Force*, Id. 384; *Billings* v. *The Mayor*, Id. 415; *Gloversville* v. *Howell*, 70 Id. 290; *Worthen* v. *Badgett*, 32 Ark. 496; *Gibson* v. *State*, 16 Fla. 291; *Gould* v. *Chicago*, 82 Ill. 472; *Farmers' Ins. Co.* v. *Highsmith*, 44 Iowa, 330; *Howland Coal Co.* v. *Brown*, 13 Bush (Ky.), 681; *New Orleans* v. *Dunbar*, 28 La. Ann. 722; *People* v. *Bradley*, 36 Mich. 447; *Perkins* v. *Du Val*, 31 Ark. 236; *Prescott* v. *City*, 60 Ill. 122; *People* v. *Wright*, 70 Id. 388; *People* v. *Brislin*, 80 Id. 423; *Crescent Gas Light Co.* v. *New Orleans*, 27 La. Ann. 138; *New Orleans* v. *New Orleans R. R. Co.*, Id. 414; *Ohio* v. *Covington*, 29 Ohio St. 102; *Shields* v. *Bennett*, 8 W. Va. 74; *Woodson* v *Murdock*, 22 Wall. 351; *Tallahassee Mfg. Co.* v. *Glenn*, 50 Ala. 489; *State* v. *Price*, Id. 568; *Burke* v. *Munroe Co.*, 77 Ill. 610; *Williams* v. *State*, 48 Ind. 306; *Harris* v. *People*, 59 N. Y. 599; *Morton* v. *Comptroller General*, 4 S. C. 430; *Hingle* v. *State*, 24 Ind. 32.)

II. The act is not special. It embraces all the insane, it is general in all its provisions, and it operates uniformly throughout the state. (*McGrath* v. *State*, 46 Md. 634; Cooley's Const. Lim. 128, n.; *State* v. *Commissioners*, 29 Md. 520; *Wheeler* v. *Philadelphia*, 77 Pa. St. 348.)

III. The erection of buildings for the care of the insane is a part of the business of the state. This duty is enjoined upon the legislature in the most comprehensive terms. (Sec. 1, art. XIII.) At the time the constitution was adopted there was no insane asylum in the state, and it was the intention of the framers of that instrument, that proper laws should be adopted with provision for the support of the insane. The authority given to provide for the

support of the insane carries with it the power to do everything necessary to attain that end.

IV. The tenth and eleventh sections of the act do not authorize the transfers of moneys pledged for educational purposes to another fund for other purposes. (Sec. 3, art. XI. of the Constitution.) The state is prohibited by it from ever using for any purpose any part of the principal of the proceeds from the sources mentioned, but the interest of the principal is permitted to be used for the benefit of the public schools. In order that any benefit can be derived from the moneys in the state school fund, it is necessary that the principal should be invested either in United States bonds or Nevada state bonds. In obedience to this section the legislature has from time to time provided for the investment of the moneys belonging to the state school fund. It is made the duty of the proper state officers to cause the investment of the moneys in the state school fund, whenever there is any to invest, in United States securities, or in bonds of this state. There is no transfer of funds from the state school fund to any other fund authorized by sections 10 and 11 of the act in question within the prohibition of section 3, art. XI., but the authority is given to the state to borrow eighty thousand dollars upon the security of its bonds, as provided in that section. By the deposit of the state bonds in the state school fund, the credit of the state is pledged for the repayment of the money borrowed, and interest thereon. The test of this is whether a debt is created by the transaction in favor of the state school fund. If there is, there is no transfer of moneys from the state school fund to another fund for other uses, but there is a strict compliance with the provisions of section 3, art. XI. of the constitution, and the laws passed to carry that section into effect.

V. The public debt of this state does not exceed three hundred thousand dollars, and it will not exceed it when the whole eighty thousand dollars appropriated by sections 10 and 11 is negotiated. (The various statutes and constitutional provisions bearing upon this subject are discussed at length.)

Opinion of the Court—Belknap, J.

By the Court, BELKNAP, J.:

By an act passed at the last session of the legislature the respondents herein were, with others, created a board of commissioners for the care of the insane of this state. (Stats. 1881, 59.)

They are required by the act in question to cause to be erected upon land belonging to the state, near the town of Reno, an asylum of sufficient capacity for the care of one hundred and sixty patients. The act directs the time within which the building shall be completed, the material of which it shall be constructed, its maximum cost, and the manner in which contracts for its construction shall be made. It appropriates the sum of eighty thousand dollars for constructing and furnishing the asylum, and in the eleventh section provides as follows: "The money herein appropriated shall be taken from the state school fund, and in its place shall be deposited eighty bonds of one thousand dollars each, bearing interest at the rate of four per cent. per annum; said bonds shall run for twenty years, but shall be redeemable by the state at its pleasure, after two years; said bonds shall be signed by the governor and state controller, countersigned by the state treasurer, and authenticated by the great seal of the state, and shall state in substance that the state of Nevada owes to the state school fund eighty thousand dollars, the interest on which sum, at four per cent. per annum, she agrees to pay during the life of said bonds, for the benefit of the common schools of the state; said bonds shall be lithographed, as is usual in similar cases, and deposited with the treasurer of the state. The interest on said bonds shall be paid semi-annually, on the first days of January and July of each year, on the written order of the state board of education to the state controller, directing him to draw his warrant for the amount of such semi-annual interest on the indigent insane interest and sinking fund herein created. All sums derived from the interest of said bonds shall go into the general school fund, for the support of the common schools of the state, and for the regular and prompt payment of which the faith and credit of the state is hereby pledged."

The twelfth section provides for the levy and collection of a tax, the proceeds of which are appropriated for the payment of the principal and interest of the bonds mentioned in the preceding section. Subsequent sections provide for the care of the insane pending the completion of the building, their management thereafter, and other matters, which are not drawn in question. Appellant claims that so much of the act as is contained in the eleventh and twelfth sections is unconstitutional, and seeks by this action to restrain respondents from issuing the moneys in the state school fund, as they are directed to do by the twelfth section.

The first ground of objection to the validity of the act is that it does not comply with the requirements of section 17 of article IV. of the constitution. This section provides that each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, and that such subject shall be briefly expressed in the title. The title of the act is "an act to provide for the taking care of the insane of the state of Nevada," and it is insisted that the act not only embraces the subject expressed in the title, but two other subjects; that is to say, provision for a state loan and for the investment of moneys of the state school fund.

The restriction upon the legislature contained in section 17 of article 4, was considered by this court in the case of *State* v. *Silver*, 9 Nev. 231. It was then declared that the design of the constitution in requiring that each enactment should contain but one subject and matter properly connected therewith, was to prevent improper combinations to secure the passage of laws having no necessary or proper relation, and which, as independent measures, could not be carried; and that the object of the other requirement, that the subject of the act should be expressed in the title, was that neither the members of the legislature nor the public should be misled by the title.

"The constitution does not require that the title of an act should be the most exact expression of the subject which could be invented," said the court of appeals of New York

in the matter of the petition of Mayer (50 N. Y. 504). "It is enough if it fairly and reasonably announces the subject of the act."

"The general purpose of these provisions is accomlished," says Judge Cooley in his Treatise on Constitutional Limitations, page, 143, "when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

It has accordingly been held in Kentucky, under a similar constitutional provision, that an act entitled "An act to amend the charter of the Cincinnati and Covington bridge company," a provision that the bridge company might sell and the city of Covington might subscribe for one hundred thousand dollars of the stock, and sell the bonds of the city and levy a tax to pay them, was valid. The court said: "None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title. * * * The power to sell stock to the city of Covington necessarily requires that a power should be conferred on the latter to subscribe and pay for it; for without such a power the power to sell would be nugatory. The subject is the same, although it relates to a transaction to which two corporations are parties, one of which only is named in the title of the act. If by the act a power had been conferred on the city of Covington to subscribe for the stock of any other corporation but the one named in the title of the act, then the provision would fall within the constitutional prohibition, and be clearly null and void. But as it is restricted in its operation to matters pertaining to the bridge company, and the provisions of the act, so far as they relate to the city of Covington, are apposite to the purpose which was intended to be effected by its passage, and are sufficiently indicated in its title, it is not liable to this constitutional objection. It was certainly not necessary for the legislature to pass two

separate acts to effect the object it had in view—one to enable the company to sell the stock to the city, and another to enable the city to subscribe and pay for it. The constitutional provision must receive a rational construction, and not one that would lead to such an unnecessary and absurd result." (2 Met. (Ky.) 219.)

In *People ex rel. Hayden* v. *City of Rochester*, 50 N. Y. 525, it was held that, in an act entitled "an act in relation to the erection of public buildings for the use of the city of Rochester," a provision for selecting and procuring a site for the contemplated buildings was valid under a similar constitutional provision, upon the ground that it was a necessary step towards the erection thereof. The court said: "But buildings can no more be erected without sites than without materials or means to defray the expense. All these are details, and no reference thereto in the title is required. The act in all its parts may and will, with the site selected, be fully executed without any violation of the constitution."

So, under a similar clause in the constitution of Illinois, it was held that an act entitled "an act to authorize the town of Ottawa to erect two bridges across the Illinois and Michigan Canal," and containing provisions for raising money to defray the cost of such bridges, did not embrace more than one distinct subject, that the title was properly expressed and the act valid. (*Ottawa* v. *The People*, 48 Ill. 233. See also *Brewster* v. *City of Syracuse*, 19 N. Y. 116; *Gordon* v. *Cornes*, 47 Id. 608; *People ex rel. Rochester* v. *Briggs*, 50 Id. 555; *People ex rel. Burroughs* v. *Brinkerhoff*, 68 Id. 259.)

We are unable to find anything in the act under consideration that does not relate to the care of the insane. The general subject of the act includes not only the construction of an asylum but necessarily the means by which the work is to be accomplished, and the proceedings necessary to be adopted for the purpose of defraying the expense to be incurred. Certainly no one interested in the act would fail to comprehend from its title that it contem-

plated the expenditure of money, for the care of the insane necessarily involves such expenditure.

The legislature is the sole judge of the mode by which this money shall be provided, and was equally authorized to raise it by loan or appropriate it from the general revenues. The act has but one subject, and that is the care of the insane. All of its provisions have this common object in view. The different steps by which the result is to be accomplished are not different subjects, but minor parts of the same general subject, and legislation would be impossible if all of these details were required to be provided for by distinct enactments.

The second objection to the validity of the act arises under sections 2 and 3 of article IX. of the constitution. By section 2 the legislature is required to provide for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year, and in case the expense shall in any year exceed the revenue, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of the ensuing year or two years. Section 3, for the purpose of enabling the state to transact its business upon a cash basis, authorizes a bonded debt which shall never, in the aggregate, exceed the sum of three hundred thousand dollars, except in certain enumerated cases. It is contended that the building of an insane asylum is a part of the ordinary business of the state, and in view of the provisions contained in the sections mentioned, the expense of constructing such building should be taken from the revenues arising from taxation.

The authority to create a bonded debt is subject to no restrictions or conditions whatever save that such debt shall not exceed the sum of three hundred thousand dollars, and the law authorizing it shall provide for its payment within twenty years by taxation. The constitution nowhere declares the necessity which shall exist as prerequisite to the issuance of bonds or the making of a loan under this section, nor the use to which money obtained by such loan

shall be applied. From the language employed by the instrument itself, as well as from the debate in the convention upon those portions of the constitution relating to state finances, the object in authorizing a bonded indebtedness was to enable the state to maintain its business upon a cash basis, notwithstanding financial exigencies, without resorting to onerous taxation.

For the first three years subsequent to the adoption of the constitution, the legislature was restricted from levying a tax for state purposes exceeding one per cent. per annum. (Sec. 24, art. XVII.) In the discussion of this restriction in the constitutional convention it was in several instances urged that if this rate of taxation failed to produce the necessary revenue to defray the expenses of the state, relief could be had by the issuance and sale of the bonds of the state to the amount of three hundred thousand dollars, under the provisions of section 3 of article IX. No suggestion was ever made, so far as appears from the debates, of the right of the legislature to seek relief at any time by this means. It has the power to direct the issuance of bonds under this clause at any time so long as it does not conflict with the limitation as to amount.

The next objection is that the act contemplates an indebtedness in excess of that authorized by the constitution. Under section 7 of article XVII. of the constitution, the state was required to assume all debts and liabilities of the territory of Nevada unpaid at the time of the admission of the state into the Union, but it was provided that such assumption should not prevent the state from incurring the three hundred thousand dollars indebtedness as provided in section 3 of article IX. already mentioned. At the session of 1871 the legislature determined the territorial indebtedness to be three hundred and eighty thousand dollars, for which amount a loan, bearing interest at nine and one half per cent. per annum, payable in fifteen years, was by authority of law negotiated. (Stats. 1871, 80.)

Before this loan became due, and for the evident purpose of reducing the rate of interest which the state was paying upon it, the legislature, by acts approved March 8, 1877,

and January 28, 1879, respectively, authorized the purchase and retirement of the bonds issued under the act of 1871, and the issuance of a new bond for three hundred and eighty thousand dollars, bearing interest at the rate of five per cent. per annum. In the purchase of the bonds of 1871 the sum of three hundred and twenty-five thousand dollars belonging to the school fund was used, and the new bond was executed to and became the property of the school fund.

These proceedings it is claimed amounted to a payment of the bonds of 1871, and extinguishment of the territorial indebtedness; that the three hundred and eighty thousand dollars in bonds now outstanding, and in the school fund, exceeds the maximum indebtedness allowed by the constitution, and therefore the legislature has no authority to issue the eighty thousand dollars of bonds provided for by this act. But this position is untenable. The proceedings by which the bonds of 1871 were retired, and the three hundred and eighty thousand dollar bond, now in the school fund, issued, did not extinguish the territorial indebtedness. That indebtedness still exists, but it is evidenced by a different obligation; that is to say, by a bond for three hundred and eighty thousand dollars, bearing five per cent. per annum interest, instead of bonds for the same amount, bearing nine and one half per cent. interest per annum.

Finally, objection is made that the eleventh section of the act directs a transfer of the moneys of the school fund to another fund and for another purpose. Under section 3 of article IX. of the constitution, the proceeds of the sales of public lands donated to the state by the general government, as well as moneys received from other sources, are solemnly pledged for educational purposes, and required to be placed in the school fund, and not be transferred to any other fund or for other use. This fund the legislature is commanded to invest in "United States bonds or the bonds of this state," and the interest only of the capital of the fund shall be used for educational purposes.

In this behalf it is urged that the issuance of the bonds provided for in this act is an evasion of the investment di-

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rected by the constitution; that the constitution contemplates the purchase of bonds existing at the time of the passage of the enactment authorizing the loan. This objection is without force. It is manifest that the bonds provided for by this act are as much the bonds of the state as if they had been outstanding at the time of the passage of the act, and were thereafter to be purchased for the benefit of the school fund. The legislature primarily directs the investment of the moneys in this fund, and so long as it complies with the directions of the constitution, and makes the loan upon the securities required by that instrument, the loan will be valid. A discretionary power is conferred to invest the fund either in the bonds of the state or of the general government, and any attempt on the part of courts to supervise such discretion would be an invasion of the authority of the legislature.

The act being constitutional, the judgment of the district court refusing to restrain respondents from proceeding, should be affirmed, and it is so ordered.

[No. 1,076.]

THE STATE OF NEVADA, RESPONDENT, *v.* ROBERT ST. CLAIR, APPELLANT.

INSTRUCTIONS—FORM OF VERDICT—MURDER AND MANSLAUGHTER.—The court gave a proper definition of murder in the first and second degrees, manslaughter, and justifiable homicide, and instructed the jury to designate the offense, if any, of which the defendants should be found guilty. The court gave a form of verdict for "murder in the first degree," "murder in the second degree," and "not guilty:" *Held*, that the forms were merely given as a guide to the jury, and could not be considered to limit the rights of the jury to a consideration of the defendant's guilt to the two degrees of murder, and that the jury could not have been misled by the omission of the court to give a form of verdict for manslaughter.

IDEM—DUTY OF COUNSEL TO ASK FOR INSTRUCTIONS.—If counsel considered it important that a form of verdict for manslaughter should be given, it was their duty to prepare the same or request the court to give it.

NEW TRIAL—CONFLICTING AFFIDAVITS—MISCONDUCT OF JURORS.—In the case of a conflict in the affidavits on motion for a new trial on the ground of misconduct of jurors: *Held*, that it was the duty of the district court

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to determine the question of veracity, and that its action in this respect will not, upon the showing made, be disturbed.

PRESUMPTIONS—CONDUCT OF JURORS—VAGUE RUMORS.—The presumption is that every juror is a man of ordinary intelligence, and that he acts conscientiously in the performance of his sworn duty, and that he would not be improperly influenced by vague rumors.

MODIFICATION OF INSTRUCTIONS.—*Held*, upon review of the instructions, stated in the facts of this case, that the modification made by the court could not have misled the jury to the prejudice of the defendant.

REFUSAL OF INSTRUCTIONS ALREADY GIVEN IN SUBSTANCE—NOT ERROR. It is not error to refuse instructions asked by defendant when the court of its own motion gave proper instructions upon the subject-matter embraced therein.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

On the trial of this cause, three witnesses, Campbell, Weill, and Mohler, testified that at the time of the homicide they were at work in an adjoining field about one hundred and twenty-five rods distant from the bridge where the body of deceased, Patrick Tully, was found; that Campbell and Weill were on an elevation about eight feet, and Mohler about two feet, above the ground; that there was grass growing in a field between witnesses and the bridge, but that no other object obstructed the view; that if a man on the ground at the scene of the homicide or anywhere in the vicinity of the deceased's house or the bridge was standing up, his person from his head down as far as his hips would be easily visible to said Campbell, Weill, and Mohler, but that the bridge was not visible to them at the time the shots were fired; that while they were so at work they heard a shot fired in the direction of and at the house and bridge; that immediately witnesses looked up and saw defendant in the act of firing a pistol in front of the house and right close to the bridge; after witnesses looked up they saw defendant fire three more shots; they heard the shots and saw the smoke from the pistol, and these were fired rapidly; that after the firing of these three shots had ceased defendant walked up a few steps and then squatted down so that witnesses could only see his shoulders, and witnesses could not tell what he was doing while so squat-

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ted down; that after remaining a few seconds, defendant raised up and ran toward the door of the house and disappeared; that they could not see whether defendant entered the house or not; that defendant was out of sight for two or three minutes, and then reappeared and returned to the place where he had squatted down; that they then heard a shot from a much smaller pistol than the one from which the four first shots had been fired; that then defendant stooped down again, remained so a few seconds, got up and walked around the place and then walked away up toward the station and met some person on horseback, there halted, and soon turned around and came back to the bridge, there halted again for a few minutes, and then started on the road to his own house.

The defendant in his own behalf testified, that he was walking in front of the bridge when the deceased sprang forward, thrust his pistol across defendant's breast and fired a shot from a small pistol; that deceased also fired two other shots from the same pistol, which did not take effect; that defendant then drew the large pistol and deceased started to run toward the bridge, and as he did so defendant fired at him four shots from the large pistol, the first of which was fired just as defendant turned to run and struck deceased in the breast; that the other shots were fired rapidly while deceased was running and defendant was pausing; that deceased fell and expired on the bridge and laid in the position as before described. That when defendant found that deceased was dead, defendant was horrified and excited and started across the fields toward the house of Mr. Marzen, and had passed deceased's house, when he saw Michael coming from the station on horseback, and then defendant went back toward the bridge, and when he arrived there his pistol was accidentally discharged; that defendant then went up the road and met Michael and sent him back to the station for assistance; that defendant's pistol was loaded with conical balls and round balls; that the chambers which contained the round balls contained twice the amount of powder that the chambers did which contained the conical balls; that when they arrived at the

bridge they discovered the dead body of deceased lying on the bridge; that the first four shots were in their opinion from the same pistol, and that pistol was a large pistol; that the other shot was from a very small pistol.

The record states "that said witnesses Campbell, Weill, and Mohler did not, and neither of them did, and no witnesses in the case did state in testimony directly and in so many words, that said Campbell, Weill, and Mohler did not see at the time said shots were fired by defendant the deceased standing up; but there was evidence given in the case tending to prove that said Campbell, Weill, and Mohler did not and that neither of them did see Tully, the deceased, standing up at the time defendant fired said shots or either of them."

The defendant presented and asked to be given an instruction in the words following, to wit: "The jurors must not presume that the witnesses Campbell, Weill, and Mohler did not see Tully, the deceased, standing up at the time of receiving the fatal shot, or shots, unless the evidence shows to the contrary."

The court gave said instruction after adding the words following, to wit:

"But this does not mean that you must necessarily presume that said witnesses did see said Tully standing up at said alleged time, merely because there is no testimony herein of one or more witnesses, if such is the case, declaring directly and in so many words that said Campbell, Weill, and Mohler did not at said alleged time so see said Tully; for if the evidence in the case should satisfy your minds beyond a reasonable doubt that said Campbell, Weill, and Mohler did not so see said Tully at said alleged time, you would be perfectly justified in coming to the conclusion that said Campbell, Weill, and Mohler did not so see said Tully at said alleged time, even though no witnesses in the case have testified directly and in so many words that said Campbell, Weill, and Mohler did not so see said Tully at the said alleged time; and merely because said Campbell, Weill, and Mohler did not testify herein, directly and in so many words, that at said alleged time they did not see said Tully standing up,

it does not follow as a matter of law, either that said Tully was standing up at said alleged time, or that said Campbell, Weill, and Mohler, or either of them, saw said Tully standing up at said alleged time."

M. S. Bonnifield, for Appellant:

I. The court erred, in not giving the jury a form of verdict for manslaughter. (Hillyer on New Trials, 258; 22 Iowa, 270; *Garrett* v. *Gonter*, 42 Pa. St. 143.)

II. The instruction asked for by defendant relative to the testimony of the witnesses was pertinent and proper. The modification by the court was erroneous. Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption of law. (Hillyer on New Trials, 284; *King* v. *Pope*, 28 Ala. 601, and cases cited.)

M. A. Murphy, Attorney General, for Respondent:

I. This court will not disturb the decision of the court in overruling the motion for a new trial upon the ground set out in the affidavits. (*Costly* v. *State*, 19 Ga. 628; *State* v. *Harris*, 12 Nev. 414; *State* v. *Jones*, 7 Id. 413; *Carnaghan* v. *Ward*, 8 Id. 33; *People* v. *Boggs*, 20 Cal. 434.)

II. The modifications and additions made to the instructions did not injure the defendant. The instruction asked by defendant attempted to instruct the jury upon a question of fact, and was to the effect that the jury must not consider the testimony of the witnesses Campbell, Weil, and Mohler, and without the modifications and additions given by the court, it took from the jury the right to consider and weigh said testimony and draw their own inference therefrom.

III. The judge is not bound to give the instructions asked, in the language in which they are framed; he may modify the charges so as to make them conformable to his own views of the law. (*State* v. *Turner*, 19 Iowa, 148; *State* v. *Collins*, 20 Id. 90; *Mask* v. *State*, 36 Miss. 94; *People* v. *Dodge*, 30 Cal. 450.)

By the Court, HAWLEY, J.:

Appellant, having been convicted of murder in the second

degree, appeals to this court, and claims that, upon several grounds, the court erred in refusing to grant him a new trial.

1. Did the court err in failing to give to the jury a form for a verdict of manslaughter? We think not.

The record shows that the jury was properly instructed as to what constituted murder in the first degree, murder in the second degree, manslaughter, and justifiable homicide; that the court also instructed the jury as follows: "Should you find the defendant guilty, you will designate, by your verdict, the offense of which you find the defendant guilty;" that prior to the commencement of the argument of counsel, and at the close thereof, the court asked counsel for defendant "to prepare and hand to the court any forms of verdict defendant might desire to have the jury place their verdict in;" that defendant's counsel prepared the form of a verdict of "not guilty," which the court gave to the jury, that the court of its own motion, gave the form of a verdict for "guilty of murder in the first degree" and "guilty of murder in the second degree." Upon these facts it is clear, to our minds, that the jurors were not misled, as claimed by appellant's counsel, into the belief that if they found defendant guilty they were confined in their deliberations, as to the degree of guilt, to the two degrees of murder. It was their duty, if they believed, from the evidence, that the defendant was guilty of any offense (and they were so instructed), to determine the degree of guilt from the evidence adduced at the trial. The forms were merely given as a guide to the jury in framing their verdict, and were not intended, and could not have been considered, to limit the right of the jury to a consideration of the defendant's guilt to the two degrees of murder. Moreover, if counsel for defendant considered it important that a form of verdict for manslaughter should be given, it was their duty either to prepare the same, or, at least, to request the court to give a form of verdict for each of the lesser degrees of guilt.

2. The court did not err in refusing to grant a new trial upon the grounds presented by the affidavits in the bill of exceptions.

The affidavits of Nagle, a person confined in jail for con-

tempt of court, and of the defendant, allege that, after the jury retired to deliberate upon a verdict, they heard the jurors discuss the question of the guilt or innocence of the defendant; that they heard three of said jurors vote not guilty; that some of the jurors said that if the jury would agree to a verdict of murder in the second degree they would recommend defendant to the mercy of the court; that they distinctly heard W. H. Woolcock, one of the jurors, say that he did not believe the defendant guilty, but if the jury would recommend the defendant to the mercy of the court he would support the verdict of murder in the second degree; that John Byrnes, one of the jurors, said to the others, in substance, that he knew the defendant went armed and was in the habit of knocking fellows over the head with his pistol; that he did not have any friend in the county and was a dangerous man. These statements are contradicted by the affidavits of the sheriff and the deputy sheriff, to the effect that it is impossible for any one in the jail, where Nagle and the defendant were confined, to distinguish anything that is said in the jury-room.

It was the duty of the court to determine the question of veracity presented by these conflicting affidavits, and its action in this respect will not, upon the showing made, be disturbed.

The attorneys for the defendant state in their affidavit "that the facts set out in the fifth ground of motion for new trial are, each and all, true, substantially as therein set out." The facts stated in this ground are as follows: "E. P. Torrey is, and at all times since said indictment was, professedly a warm friend of defendant; was called regularly as a juror in the case; was examined on his *voir dire* by both parties and passed, and was excused peremptorily by plaintiff. W. H. Woolcock, one of the jurors who tried this case, was, at the time the jury was impaneled, in the employ of said Torrey as foreman in a mine; had been so employed for several months, and ever since said trial has been in said employment. Within one or two days before the final submission of the case to the jury, by the court, the sheriff informed said jurors, and each of them, that it was rumored in

town that said Torrey had a conversation with said Woolcock at the hotel upon the occasion of said jurors taking supper there. John Byrnes, one of said jurors, informed the court in open court, of said alleged rumors, and asked that the matter might be investigated. The sheriff stated in open court that he had heard such rumors, and so informed the jury."

These affidavits, in so far as they state that the sheriff informed the jurors of the rumor, seem to be denied by the sheriff, who states, in his affidavit, that he "did not, during the trial of said case, speak to said jurors, or either of them, on the subject of said case, nor allowed any other person to speak to said jury, or either of them, on the subject of said case."

But how could the rumor have influenced the jury to the prejudice of the defendant? His counsel argue that the rumor was started for the purpose of intimidating the juror Woolcock, and to compel him to vote for a verdict of guilty through fear that if he voted otherwise people would say that he had been improperly influenced by Torrey. The natural presumption is that every juror is a man of ordinary intelligence, and that he acts conscientiously in the performance of his sworn duty. The affidavits of Nagle and the defendant being disregarded, there is nothing left in the record to show that Woolcock had any hesitation in voting for a verdict of guilty, or that he was in any manner influenced by the rumor of the reported conversation with Torrey.

The rumor was, at most, of a very indefinite and uncertain character. It was not reported that Torrey and Woolcock had any conversation about the case. That is left as a matter of inference. It is not even claimed that there was any foundation for the rumor, for there is no attempt to show, as a matter of fact, that any conversation whatever actually occurred between Torrey and Wcolcock after the jury was impaneled to try the case. Counsel simply claim that the rumor was started for a sinister purpose, and that it was used as a scarecrow to frighten Woolcock and keep him from voting for a verdict of not guilty.

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The record fails to sustain this position. It is utterly untenable. It would be unreasonable for us to presume that any juror was improperly influenced by such a vague rumor.

3. The court did not err in giving the instruction, as modified, relative to the presumptions of the jury upon the testimony of the witnesses Campbell, Weill, and Mohler.

The modification was unnecessarily lengthy, and contained a useless repetition of words; but we are unable to see how the jury could have been misled thereby to the prejudice of the defendant. It was the duty of the jury to determine the question whether, at the time of the homicide, the deceased was standing up or lying down, from all the facts and circumstances surrounding the case, and not to draw any presumption from the mere fact that the witnesses Campbell, Weill, and Mohler did not, in so many words, directly state that they did not see the deceased standing up.

4. The action of the court in refusing to give the instructions "E" and "K," asked by defendant's counsel, is sustained, upon the ground that the court, of its own motion, gave proper instructions upon the subject-matter embraced therein. (*State* v. *O'Connor*, 11 Nev. 416; *State* v. *Rover*, 13 Id. 18; *State* v. *Hamilton*, Id. 386.)

The judgment of the district court is affirmed.

[No. 1,077.]

M. C. LAKE, RELATOR, *v.* S. D. KING, RESPONDENT.

FINAL JUDGMENT—DIVORCE—APPEAL.—In an action for divorce, brought by Jane Lake against relator, the court, upon special issues of fact found by a jury, ordered that the bonds of matrimony existing between the parties be dissolved, and reserved from its decision the question of the division of the common property, and the question of the custody of their child: *Held*, that the judgment ordered by the court was not a final judgment in the case, and that no appeal could be taken from the orders made thereafter for alimony, and for counsel fees.

APPLICATION for mandamus before the Supreme Court.

The facts are stated in the opinion.

R. M. Clarke, for Relator.

C. S. Varian, and *Lindsey & Dickson*, for Respondent.

By the Court, LEONARD, C. J.:

Respondent is the acting and qualified judge of the second judicial district court in this state. At a prior date, Jane Lake commenced an action in said court against the petitioner, M. C. Lake, for a divorce from the bonds of matrimony, for a division of the alleged common property, and for the custody of a child of said Jane and M. C. Lake. Issues of fact were raised by petitioner in his answer, not only as to plaintiff's allegations upon which she claimed a divorce and custody of the child, but also as to the amount and value of the common property. At the trial the plaintiff demanded a jury, which was thereupon impaneled, and it was stipulated by counsel for the respective parties, in open court, that the question of the division or disposition of the alleged common property be withdrawn from the jury and reserved, and thereafter, if necessary, tried by the court, and it was so ordered. Special issues of fact were submitted to, and found by, the jury, and both parties moved for judgment thereon. The court granted plaintiff's motion for judgment, and ordered that the bonds of matrimony then existing between the parties be dissolved, and reserved from its decision the question of division of the common property, to be determined upon testimony thereafter to be taken by the court, and also the question of the custody of the child. Within five days, counsel for defendant filed and served a notice of motion for a new trial, and obtained an extension of time in which to file and serve statement, which motion is now pending. Subsequently sundry orders were made for the payment of alimony and counsel fees for plaintiff. Wishing to appeal from those orders, the defendant in that case and petitioner here, filed and served a statement on appeal therefrom, and applied to the court for a stay of proceedings upon the same, until his statement could be settled. The court refused to order a stay, upon the ground that the

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orders mentioned were not appealable, and thereafter refused to settle and allow said statement for the same reason.

Petitioner applies for an alternative writ of mandamus, commanding respondent forthwith to settle said statement on appeal, or to show cause to this court why he has not done so.

The orders complained of are not included among those from which an appeal may be taken before final judgment. If an appeal lies from these orders it is because they are special orders made after final judgment. Was the judgment of divorce a final judgment? In *Perkins* v. *Sierra S. M. Co.*, 10 Nev. 411, this court said: "It is contended by appellant that the judgment was contingent and interlocutory, not final. What is a final judgment? This question has been frequently decided by the courts. A judgment or decree is final that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court. When no further action of the court is required in order to determine the rights of the parties in the action, it is final; when the cause is retained for further action, it is interlocutory." (See, also, *State* v. *Logan*, 1 Nev. 514.)

By stipulation the issues in the divorce suit were only tried and settled in part, and the remainder were reserved for future action. The judgment was not final, and respondent did not err in refusing to settle a statement on appeal from the orders mentioned. Writ denied.

[No. 1,084.]

S. F. HOOLE, RELATOR, *v.* JOHN H. KINKEAD, GOVERNOR, ET AL., BOARD OF COMMISSIONERS FOR THE CARE OF THE INSANE, RESPONDENTS.

LOWEST RESPONSIBLE BIDDER—STAT. 1881, 59, CONSTRUED.—In providing for the erection of an insane asylum, the statute declared that the board of commissioners might adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken: *Held*, that the provision for the lowest responsible bid is mandatory; but in ascertaining whether

or not a bidder was responsible, the board was required to deliberate and decide, and in doing so they exercised judicial functions.

IDEM—PECUNIARY ABILITY AND SKILL OF CONTRACTOR TO BE CONSIDERED.—In deciding upon the responsibility of bidders it was the duty of the board to consider their pecuniary ability to perform the contract and to ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract.

MANDAMUS—JUDICIAL FUNCTIONS.—A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to determine a question of fact, the duty is judicial, and however erroneous its decision may be, it can not be compelled by mandamus to alter its determination.

APPLICATION for mandamus.

The facts are stated in the opinion.

Thomas E. Haydon, for Relator:

I. A statute that imposes a duty and gives the means of performing it is mandatory. (*Veazie* v. *China*, 50 Me. 518; *Boren* v. *Commissioners*, 21 Ohio, 321 *et seq.*; 19 Id. 97, especially 108, 109; *People* v. *Contracting Board*, 46 Barb. 256.)

II. Statutory requisitions are deemed directory, only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than substance. (Sedg. on Stat. and Con. Law, 321; *People* v. *Schermerhorn*, 19 Barb. 540; *Steel* v. *Steel*, 1 Nev. 27; *Corbett* v. *Bradley*, 7 Id. 106.)

III. The will of the legislature, clearly ascertained, should control. (*Bartlett* v. *Morris*, 9 Porter (Ala.), 268–9; *Thorpe* v. *Schooling*, 7 Nev. 17; *Odd Fell. Sav. Bank* v. *Quillen*, 11 Id. 109.)

M. A. Murphy, Attorney General, and *W. E. F. Deal*, for Respondent:

I. This court will not issue the writ of mandamus where it appears upon the face of the petition that the commissioners have awarded the contract. (Moses on Mandamus, 53; *Treadway* v. *Wright*, 4 Nev. 119; High. on Injunction, sec. 32, *et seq.*, sec. 44; *County Court of Warren* v. *Daniel*, 2 Bibb. (Ky.) 573; *People* v. *Contracting Board*, 27 N. Y. 380; 33 Id. 382; *State* v. *Board of Education*, 24 Wisc. 683.)

II. One who sues for the writ of mandamus must have some well-defined right to enforce, which is specific, complete, and legal, and for which there is no other legal remedy. (*Commonwealth* v. *Mitchell*, 82 Pa. St. 343; *People* v. *Aldermen*, 11 Abb. Pr. 289; *People* v. *Smith*, 12 Id. 133; *People* v. *Hayt*, 66 N. Y. 606; *State* v. *Mayor*, 35 N. J. L. 396.)

By the Court, LEONARD, C. J.:

Under the statute of this state, passed at the last session of the legislature (Stat. 1881, 59), respondents invited proposals for the erection of an insane asylum at Reno, according to plans and specifications previously adopted. Bids were presented by different parties, and among them were those of plaintiff, offering to furnish all materials and do all the work for the completion of the buildings, for the sum of fifty-two thousand dollars, and of certain citizens of Reno offering to furnish the same materials, and do the same work, for the sum of sixty thousand dollars. After a careful examination, upon the knowledge of the commissioners and evidence received touching the responsibility of the several bidders and their sureties, the contract was awarded to the citizens of Reno, last named, for the sum of sixty thousand dollars, upon the ground that theirs was the lowest responsible bid. Plaintiff has applied to this court for a peremptory writ of mandamus to compel respondents to cancel the award made as aforesaid, and to award said contract to him as the lowest responsible bidder.

In their answer, respondents deny that plaintiff's bid was the lowest responsible bid, and allege that the bid accepted, the citizens' bid, was such. They deny that plaintiff can build the buildings specified in the plans and specifications for the sum of fifty-two thousand dollars, or that he has the requisite credit or means to build the same for less than about sixty thousand dollars. They deny that all the sureties upon the bond offered by the plaintiff can qualify for the sums they propose to become sureties for, on said bond, under the several exactions of the law respecting property exempt from execution, or over and above all their debts and liabilities. They deny that plaintiff's bid is reasonable

or satisfactory, or that it is entirely or in any way responsible.

They allege that all bids offered were carefully considered with reference to the responsibility of the sureties offered, and as to whether said bids were made in good faith with the purpose of erecting said buildings according to the plans and specifications; that from the testimony of skilled experts, they ascertained that they could not be accordingly erected for less than fifty-eight thousand dollars; that after laborious examination and inquiry they came to the conclusion that the so-called "citizen's bid" was the lowest responsible bid, and that, therefore, they awarded the contract to the persons named therein. They also allege that, after examination, they considered the bids of Gross & Scroggins, and William Thompson, lower responsible bids than plaintiffs. They aver that, in awarding said contract they have strictly complied with the statute under which they derived their powers; that they have acted according to their best judgments, for the best interest of the state, and with due regard to the legal rights of the bidders.

It is neither alleged nor claimed that, respondents have not acted in entire good faith. Neither fraud nor negligence is urged against them; nor is it asserted, in any way, that they have been guilty of the exercise of favoritism. It follows that, at most, their fault is an error in judgment in determining that the bid for sixty thousand dollars is the lowest *responsible* bid.

Section 5 of the statute referred to provides that, "said board may adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken."

The provision that they shall take the lowest responsible bid is mandatory, and they had no power or authority to accept any other, but in ascertaining whether or not a bidder was responsible, they were required to deliberate and decide, and in doing so, they exercised judicial, not ministerial, functions.

And in deciding upon the responsibility of bidders, it

was their duty to consider not only their pecuniary ability to perform the contract, but it was their right and duty to inquire and ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work and fulfill the contract promptly, according to its letter and spirit. In *Commonwealth* v. *Mitchell*, 82 Pa. St. 349, a case similar to this, and under a statute requiring a contract for stationery, etc., to be given to the "lowest responsible bidder," the court thus forcibly expresses itself: "It is scarcely open to doubt, but that the word under consideration (responsible), as used in the statute, means something more than pecuniary ability. In a contract, such as the one in controversy, the work must be promptly, faithfully, and well done; it must, or ought to be, conscientious work. To do such work requires prompt, skillful, and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure, and worse than useless. Granted, that from such a contractor pecuniary damages may be recovered by an action at law; that is, at best, but a last resort that often produces more vexation than profit—a mere patch upon a bad job; an exceedingly meager compensation, at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not lawsuits. Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar, in a bid for the most important contract, might determine the question in favor of some unskillful rogue, as against an upright and skillful mechanic. Again, we know that, as a rule, cheap work and cheap workmen are but convertible terms for poor work and poor workmen, and if the city, for the mere sake of cheapness, must put up with these, it is indeed in a most unfortunate position. * * *

Agreeing then, as we do, with the common pleas, that the duty imposed upon the respondents was deliberative and discretionary, we must also admit the conclusion reached by

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that court, to wit: That the writ of mandamus will not lie. For it is settled beyond controversy that, where the complaint is against a person or body that has a discretionary or deliberative function to exercise, and that person or body has exercised that function, according to the best of his or its judgment, the writ of mandamus will not be granted to compel the undoing of that which has been done.

A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to determine a question of fact, the duty is judicial, and however erroneous its decision may be, it can not be compelled by mandamus to alter its determination. Such has been the uniform decision of this and other courts. Where no discretion is given to an officer or body, mandamus lies to enforce a performance of the specific act required; but it is otherwise when the duty imposed requires deliberation and decision upon facts presented. It was for the board in this case to determine the lowest *responsible* bidder. They had no right to accept the lowest bid if they were not satisfied with the responsibility of the bidder, according to the definition of the word "responsible" given above. They had the right to reject plaintiff's bid, and such was their duty, if, after examination, it was not, in their best judgment, the lowest responsible bid. The testimony before us is ample to show that, the board acted conscientiously, after faithful examination of all facts within their reach touching the questions here discussed, and their decision can not be disturbed in this proceeding. Mandamus denied, with costs against plaintiff.

[No. 984.]

DUNCAN C. MACKAY, RESPONDENT, *v.* WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

TELEGRAPH MESSAGES—DUTY OF COMPANY.—It is the duty of telegraph companies to transmit messages with reasonable diligence, and in the order of time in which they are received.

Argument for Appellant.

IDEM—DAMAGES FOR DELAY.—Unless the importance of the message is shown either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose.

IDEM.—Telegraph companies are liable to the extent of the actual damage sustained for delay or failure in transmitting a dispatch, the importance of which is manifest either by its own words or made so by explanation.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

C. J. Hillyer, for Appellant:

No damages beyond the price paid for sending the telegram were recoverable. The dispatch was in cipher, and absolutely unintelligible except to the person to whom it was sent. No explanation of its contents, or even of the nature of its subject-matter, was made to any of the defendant's agents. Admitting that telegraph companies are, in a certain sense, common carriers, and subject to the general rules, as to obligation and liability, governing such carriers, nevertheless there is a very broad distinction to be observed in the application of those rules as between them and carriers of articles of value. What the telegraph company carries is intangible, and has no intrinsic value. It can not, therefore, be an insurer in any such sense as other carriers. The liability of the latter, in case of negligence, may be determined by the value of the article lost, or the depreciation in value of the article damaged. Obviously, there can be no such liability for negligence in transmitting a telegram which has no value. In case of a breach of contract to send a telegram, the only *direct* damage is the loss of the price paid for its transmission. All other injury will fall within the class of what are legally termed consequential damages. In respect to these, the inquiry will be whether they are so related to the transaction as to be deemed a natural or sufficiently probable consequence of the negligence, or are too remote to be recoverable. (*Hayes* v. *Wells, Fargo & Co.*, 23 Cal. 185; Allen on Tel. 653; Sedg.

on Dam. 439, *et seq.; United States Tel. Co.* v. *Gildersleeve*, 29 Md. 232; *Bank* v. *Tel. Co.*, 30 Ohio St. 565; *Sanders* v. *Stuart*, L. R., 1 Com. P. Div. 326; *Lane* v. *Montreal Tel. Co.*, 7 U. C. Com. P. C. 23; *Durgan* v. *Western Union Tel. Co.*, 1 Am. Law Times (N. S.), 409; *Behm* v. *Western Union Tel. Co.*, 8 Biss. 131; *Hord* v. *Western Union Tel. Co.*, Ohio Rep.; *Schaeffel* v. *P. & A. Tel. Co.*)

Lewis & Deal, for Respondent:

I. It must be admitted that telegraph companies, like all companies and individuals, are liable for any damage resulting to another through their negligence or willful misconduct. They may make reasonable rules to govern their business and limit their liability, yet they can not make any rule to protect themselves from either willful misconduct or gross negligence. (Allen's Tel. Cas. 196, 212, 261, 471, 578.)

II. Telegraph companies can not, by any rule, limit their liability to the price of the dispatch, nor to any thing less than the actual damage. (Allen's Tel. Cas. 530.)

III. The measure of damages is the exact damage suffered by the sender of the message, that is, as in this case, the difference between the price that could have been obtained for the article ordered to be sold, and the price actually obtained. (Allen's Tel. Cas. 570, 574, 661, n.; *Parks* v. *Alta California Tel. Co.*, 13 Cal. 422; 2 Ohio Dig. 274; *Leonard* v. *Tel. Co.*, 41 N. Y. 544; *Rittenhouse* v. *Independent Tel. Co.*, Allen's Tel. Cas. 570; Scott & Jarnagin on Tel., secs. 165, 166, 242–245, 267.)

By the Court, BELKNAP, J.:

The defendant corporation received from the plaintiff, at the City of Virginia, in this state, for transmission by telegraph to San Francisco, a message, in words unintelligible by themselves, but which the broker to whom it was addressed could have understood as an order to sell two hundred and fifty shares of Mexican mining stock in his hands, belonging to plaintiff. The message was delivered to defendant at about 1 o'clock P. M. of the fourteenth day of

October, 1878, but through the negligent delay of defendant it was not received at its San Francisco office until 3:36 o'clock of that afternoon, and the plaintiff thereby lost the difference between the amount for which the stock could have been sold at the 2 o'clock P. M. informal session of the board of brokers, and that for which the stock was actually sold upon the receipt of the message by the broker. This difference the plaintiff claims he is entitled to receive as damages in this action, and under instructions supporting this theory the jury returned a verdict in favor of plaintiff for one thousand dollars.

It is the duty of proprietors of telegraph lines to transmit messages with reasonable diligence, and in the order of time in which they are received. Failure to do so creates a liability in favor of the person injured. Defendant's negligence in this respect is conceded for the purposes of this appeal, and the only question made in the case relates to the measure of damages. Defendant claims that the damages recovered were such as were not fairly within its contemplation, as the result of its delinquency, at the time it entered into the contract to transmit the message.

There appears to be no conflict in the decided cases, that in actions for breach of contract for transmission of telegraphic messages the measure of damages is the same as for breach of contract generally. In general, a party failing to perform his contract may be holden to make good the loss occasioned by his failure, but he can not be holden for remote, contingent, and uncertain consequences, or for speculative or possible results, though deducible from the failure. In the consideration of this subject the supreme judicial court of Massachusetts, in the case of *Squire* v. *Western Union Telegraph Company*, 98 Mass. 237, said: "A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be a serious hindrance to the operations of commerce, and to the transaction of the common business of life. The effect would be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound

himself to perform, and to the compensation paid and received therefor. The practical rule, founded on a wise policy, and at the same time consistent with good sense and sound equity, is, that a party can be held liable for breach of a contract only for such damages as are the natural or necessary and the immediate and direct results of the breach —such as might properly be deemed to have been in contemplation of the parties when the contract was entered into—and that all remote, speculative, and uncertain results, as well as possible profits and advantages, and other like consequences which might have arisen from the fulfillment of the contract, must be excluded as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach."

The case of *Hadley* v. *Baxendale*, 9 Exch. 341, contains the following authoritative statement of this rule, which is frequently quoted and universally accepted: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

"For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

Let us consider the facts in this case under the rule as thus laid down: When the plaintiff handed the message to the manager of the defendant corporation no explanation of its subject-matter was made. Its contents were intentionally concealed by the employment of a cipher. It is true the manager testified that the plaintiff in delivering the message to him asked if it would be received in San Francisco in time for the two o'clock P. M. informal session of the board of brokers, to which inquiry the manager replied that he thought it would. The manager also admitted that a large proportion of the dispatches sent from Virginia City to San Francisco were in cipher, and that he generally supposed such dispatches related to stocks or mining business. From these facts defendant's manager might have inferred that the message related to mining stocks; but whether it contained an order to buy or sell, or revocation of a previous order, or some communication concerning the mines, or any of the many other matters incident to mining stock transactions, was in no wise suggested. Neither the message itself nor any communication made to defendant's manager disclosed the special purpose of the plaintiff in sending the message, and because of its total ignorance of the contents, defendant could not have contemplated, within the rule stated, as the probable result of failing to promptly transmit the message, that it would be answerable for the difference in the amount for which the two hundred and fifty shares of Mexican stock were actually sold and that for which it could have been sold at the two o'clock board.

Since the loss sustained can not be "reasonably supposed to have been in contemplation of both parties at the time they made the contract, or the probable result of the breach of it," it follows that plaintiff is precluded from recovering the amount claimed The only loss which followed as a natural consequence from defendant's breach of contract was the money paid by plaintiff for the transmission of the mes-

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sage, and this is the limit of the damages he is entitled to recover under the facts presented.

Although the question herein considered has never before been adjudicated by this court, the decisions of the courts of other states uniformly sustain the principle that unless the importance of the message is shown either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose. (*Landsberger* v. *Magnetic Tel. Co.*, 32 Barb. 530; *Candee* v. *Western Union Tel. Co.*, 34 Wisc. 480; *Beaupre* v. *P. and A. Tel. Co.* 21 Minn. 155; *McColl* v. *Western Union Tel. Co.*, 12 J. & S. N. Y. 487; *Sanders et al.* v. *Stuart*, 17 Eng. (Moak's Notes), 286; *Baldwin* v. *United States Tel. Co.*, 45 N. Y. 744.)

On the other hand, telegraph companies are liable to the extent of the actual damage sustained for delay or failure in transmitting a dispatch, the importance of which is manifest either by its own words or made so by explanation. (*Leonard* v. *N. Y. Tel. Co.*, 41 N. Y. 544; *De Rutte* v. *N. Y. Tel. Co.*, 30 How. (N. Y.) 405; *Rittenhouse* v. *Independent Tel. Co.*, 44 N. Y. 265; *Bryant* v. *Am. Tel. Co.*, 1 Daly, 590; *Sprague* v. *W. U. Tel. Co.*, 6 Daly, 201; *U. S. Tel. Co.* v. *Wenger*, 55 Pa. St. 268; *Tel. Co.* v. *Dryberg*, 35 Id. 300; *True* v. *International Tel. Co.*, 60 Me. 27; *Squire* v. *W. U. Tel. Co.*, 98 Mass. 233; *Parks* v. *Alta Tel. Co.*, 13 Cal. 424; *W. U. Tel. Co.* v. *Tyler*, 74 Ill. 168; 60 Ill. 421.)

Judgment reversed.

[No. 1,031.]

SAMUEL BROWN, APPELLANT, *v.* R. W. WARREN ET AL., RESPONDENTS.

JUDGMENT OF NONSUIT—STATEMENT ON APPEAL—SPECIFICATION OF ERROR. On appeal from a judgment of nonsuit the specification of error is in these words: "To this decision and judgment of the court the plaintiff by his attorney, then and there duly excepted, and assigns the decision and judgment of nonsuit as error:" *Held*, sufficient.

NONSUIT—WHEN IT SHOULD NOT BE GRANTED.—If there is any evidence

Argument for Appellant.

which would authorize a recovery of any portion of the land in controversy a nonsuit should not be granted.

EJECTMENT—QUITCLAIM DEED—WHEN IT CONVEYS GRANTOR'S TITLE ACQUIRED BY SUBSEQUENT PATENT—NONSUIT.—C., after making final proof and payment in United States land office of the land in controversy, and receiving a duplicate receipt therefor, conveyed the same, by quitclaim deed, to B. and R., C. subsequent to this conveyance received from the United States government a patent to the land: *Held*, that, by his patent, C. acquired no right or interest in the land in question which he did not possess at the date of his deed to B. and R.; and that, upon the motion for nonsuit, plaintiff's rights should have been considered the same as they would have been if C.'s deed had been a bargain and sale deed, or if it had been executed subsequent to the date of the patent.

DESCRIPTION IN DEED—PAROL EVIDENCE OF IDENTITY.—A description in a deed conveying "all the real estate, water rights, and property of every description, real and personal, in the state of Nevada, belonging to the first parties of the first, or either of them," is sufficient to convey the title. Parol evidence is admissible to enable an identification of the property to be made.

MOTION FOR NONSUIT—GROUNDS OF MUST BE STATED—WAIVER.—It was urged upon appeal that a nonsuit should have been granted, because there was no proof of the due execution of the conveyance to plaintiff. No such ground was stated in the motion for a nonsuit: *Held*, that by failing to specify this ground at the time the motion was made, defendants waived it, and that it could not be considered on appeal.

CERTIFICATE OF REGISTER OF LAND OFFICE—EVIDENCE OF CONVEYANCE OF LAND.—A certificate of the register of the land office containing a copy of all the entries, as to preëmption, settlement, payment of purchase money, and issuance of patent, that appeared in the books of the land office, in relation to the lands in question, is competent evidence of the facts intended to be proven thereby.

ONE TENANT IN COMMON MAY MAINTAIN EJECTMENT AGAINST EVERY ONE BUT A CO-TENANT.—A tenant in common who has an interest in the property which entitles him to the enjoyment of the entire estate, can maintain ejectment against all persons but his co-tenants and parties claiming under them.

APPEAL from the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion.

Lewis & Deal and *Wm. Webster*, for Appellant:

I. The court erred in granting a nonsuit. It was shown that Brown was at least a tenant in common with Boyle in the demanded premises, and as such tenant he had the right to recover. (*Sharon* v. *Davidson*, 4 Nev. 416.)

II. At the time Countryman's deed was executed, Countryman had applied for a patent, and had paid the purchase money. That, to all intents and purposes, gave Countryman the legal title, and his deed to Boyle and Ridge carried the same to them. For all the purposes of an action of ejectment Boyle and Ridge were by such deed invested with the legal title. (*North Hempstead* v. *Hempstead*, 2 Wend. 110; Tyler on Ej. 74, 75; *Bludworth* v. *Lake*, 33 Cal. 262; 3 Green (Iowa), 349; 2 Washburne on Real Prop. 531; *Jackson* v. *McCall*, 3 Cow. 80; *Jackson* v. *Bull*, 1 John. Cas. 81; *Wallbridge* v. *Ellsworth*, 44 Cal. 353; *Crane* v. *Salmon*, 41 Id. 63; *Stark* v. *Barrett*, 15 Id. 366.)

III. The deed operated as an assignment of the duplicate receipt and the right to the patent. (*Green* v. *Clark*, 31 Id. 591.)

R. M. Clarke, for Respondents:

I. The quitclaim did not carry to Boyle and Ridge the fee subsequently acquired by patent from the United States. (*Harden* v. *Cullins*, 8 Nev. 49; *Treadway* v. *Wilder*, 12 Id. 108.)

II. The descriptive words in the deed are not sufficient to pass the interest, if any, of Ridge, which he held in common with Boyle, particularly as that interest, if any, was equitable merely. (7 U. S. Dig. 249, par. 82, 83; *Banks* v. *Moreno*, 39 Cal. 233, 239, 240; *Higueras* v. *U. S.*, 5 Wall. 828; *Power* v. *Hathaway*, 6 Hill, 453.)

III. This action being for the possession and to determine the title to the land, and also to recover value for the use and occupation, Boyle was a necessary party, and Brown, if a tenant in common only, could not maintain the suit. (Sec. 14, Civil Practice Act.; *Austin* v. *Hall*, 13 Johns. 286; *Merrill* v. *Berkshire*, 11 Pick. 269, 274; *Lane* v. *Dobyns*, 11 Mo. 105, 106, 107.)

By the Court, LEONARD, C. J.:

This is an action to recover possession of the north half of the north-east quarter, and the north-east quarter of the north-west quarter of section 12, township 19 north, range

19 east, Mount Diablo base and meridian—the same being lots 1, 2, 3 and 4 of said section—together with mesne profits, and the appeal is from a judgment of nonsuit.

1. It is claimed by counsel for respondents that the judgment below should be affirmed, because the statement on appeal does not specifically state the errors or grounds upon which appellant intends to rely on the appeal, as required by section 332 of the civil practice act. The only specification of error is in these words: "To this decision and judgment of the court the plaintiff by his attorney, then and there duly excepted, and assigns the decision and judgment of nonsuit as error."

Counsel for appellant insist that the assignment stated is sufficiently specific. The law does not require a vain thing. It was incumbent upon the plaintiff, before resting, to make a *prima facie* case entitling him, in the absence of evidence against him, to all or some portion of the relief demanded. If he did not make such showing it was the duty of the court, upon a proper motion, to enter a judgment of nonsuit.

In case of an appeal, the statute requires the appellant to state, specifically, not only the particular errors or grounds upon which he intends to rely on the appeal, but, also, that the statement "shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more." In appealing from a judgment of nonsuit, the plaintiff and appellant must set out in his statement sufficient evidence, upon every material issue, to entitle him to judgment; and if that is shown by a settled statement, he is entitled to reversal; otherwise he must fail. The burden of showing facts establishing a *prima facie* case rests upon him, and he can show them in one way only; that is, by stating so much of the evidence produced by him as is necessary to justify a recovery.

This being so, the appellant can make no more particular specification than was done in this case, except by restating the evidence or the legal conclusions resulting therefrom. He can only say the court erred in granting a nonsuit be-

cause the plaintiff made certain proof, stating it as it was given, or the substance of it, which entitles him to a judgment. Such additional specifications would aid neither the court nor counsel upon the opposite side. On an appeal like this, the appellant's theory is, and must be, that he made out a *prima facie* case in the trial court, and if respondent can show from the evidence in the statement that he failed in his evidence upon any one material point, the judgment will not be disturbed, if such failure was made a ground of the motion, or, it may be, if the omission was such that it could not have been remedied. It matters not what reasons the court may give for granting a nonsuit, or that the judgment upon those grounds is erroneous; the appellant must show by his evidence that in all other respects he was entitled to recover.

We are of the opinion, that in an appeal from a judgment of nonsuit, the plaintiff should not be required to make more definite specifications of the errors relied on than was done in this case. See *Donahue* v. *Gallavan*, 43 Cal. 576, and *Moore* v. *Murdock*, 26 Id. 524, where the specifications were: "First, the court erred in denying defendants' motion for a nonsuit at the close of plaintiff's case; second, the conclusions of law drawn by the court are not warranted by the facts found." The court evidently considered the statement of the first ground of error relied on sufficiently specific. It said: "The only point we can consider is the alleged error of the court below, in overruling the appellant's motion for a nonsuit. The other grounds of the motion for new trial were not specified, either as regards the insufficiency of the evidence or the errors in law, as required by the statute, and therefore they should be disregarded by the court below, and can not be examined on appeal."

The language of the statute requiring a specification of the errors relied on is substantially the same in applications for new trials and on appeals from judgments, and a specification that is sufficient in one case is equally so in the other. If we are correct in this, the cases cited sustain our conclusion. The first case was an appeal from a judgment of nonsuit, and in the second, as before stated, one of the

errors relied on for a new trial, was the court's refusal to grant a nonsuit. There is much greater reason for requiring the appellant on appeal from an order *denying* a nonsuit, to specify the particular errors relied on, than in cases on appeal from judgments of nonsuit. Because, in cases of the former character, any one omission may justify the nonsuit, and that may be pointed out; while in the latter cases the appellant must show himself entitled to recover from the whole case, and the error relied on—the granting of the nonsuit—can be shown only by making it manifest, from all the evidence, that he was entitled to recover upon the facts proven by him.

2. The first point made by counsel for respondents upon the merits, as a reason why nonsuit should have been granted, is stated as follows: "The land in controversy lies south of the meander line, and between that line and the center of Truckee river; and if it be said that the meander line must be conclusively taken as the river's edge, or low water mark, it must also be said that the river's edge, or low water mark, and the meander line conform, and that whatever lies between the meander line and the center of the stream is in the river. The river bed in a meandered stream belongs to the government, and in occupying, defendants committed no trespass which plaintiff could redress." It is not necessary, upon the evidence, to decide whether the proprietors of land on a meandering stream own to the actual low water line, or only to the meander line, as indicated upon the map. The testimony of the two surveyors, Merry and Baker, shows that a portion of the land in question was outside of the meander line from the river, on lot 3. Such being the case, even admitting that counsel for respondents is correct in the statement of the law, a nonsuit should not have been granted upon this ground.

3. It is next said: "Conceding for argument that the proofs show that Countryman had completed his cash entry and paid for lots 1, 2, 3, and 4, before quitclaiming to Boyle and Ridge, the quitclaim did not carry to Boyle and Ridge the fee subsequently acquired by patent from the United States.

The question for our consideration is this: Conceding the facts to be that on the third day of March, 1864, Countryman filed in the United States land office, at Carson, his declaratory preëmption statement covering the property in dispute, and on the second day of March, 1865, made final proof of settlement, improvements, etc., to the satisfaction of the register and receiver; paid the purchase money; received the usual duplicate receipt; and on the fifth day of February 1869, a patent was issued to him by the government of the United States. Did the quitclaim deed executed by Countryman and wife September 22, 1865, subsequent to making final proof and payment, but before receiving the patent, carry to their grantees, Boyle and Ridge, the legal title subsequently acquired by the patent, or transfer to them rights in the property, which would have enabled them to maintain an action for the possession thereof?

It may be admitted that a quitclaim deed only passes such interests as the grantor possesses at the time, and that it has no operation whatever upon subsequently acquired interests. It certainly transfers all existing interests and titles. We held in *Treadway* v. *Wilder*, 12 Nev. 114, that the statute of limitations did not commence to run until the legal title passed from the government; that is to say, until the issuance of the patent. But we recognized the doctrine that, after proof and payment, a preëmptor is the owner of the land, in fact, and that, thereafter, the government merely holds the naked legal title in trust for him until the patent is issued. "To maintain ejectment a right of entry and possession is all that is required." (*Toland* v. *Mandell*, 38 Cal. 43; *Dilly* v. *Sherman*, 2 Nev. 69.)

In *Bludworth* v. *Lake* (No. 1), 33 Cal. 262, the court said: "The purchase was made, the consideration money paid by the purchaser and received by the state, and the warrant authorizing the location delivered. Henceforth, the purchaser became the owner of the entire beneficial interest in that quantity of land. As soon as a valid location of the warrant was made, the right attached to the specific tract of land selected, and the legal title at once vested in the state of California, but for the benefit of the holder of the

warrant located. The purchase from the state had already been made and the land paid for. The state simply held the legal title only, without any beneficial interest whatever, with authority in the state officers to execute a patent to the beneficiary, the real party in interest. The state held the legal title in trust, only, for the purchaser, until the patent should issue. When Snelling, in this instance, made a valid location of the warrant * * * he became the owner of the entire beneficial estate, and the state held the legal title in trust for him. Snelling was entitled to a conveyance of the legal title. When he conveyed all his right, title, and interest in the land he not only conveyed his beneficial interest but his right to a conveyance of the legal title. The latter necessarily goes with the former. It is a part of the interest held at the time of his conveyance. The patent was finally issued to give effect to the right before acquired, and Bludworth took the legal title charged with the trust in favor of the grantees of Snelling. By the patent plaintiff acquired no new interest of an adverse character, subsequent to his conveyance to Hall, and the fact that said conveyance was only of his right, title, and interest, instead of a bargain and sale of land, can not affect the question."

In *Byers* v. *Neal*, 43 Cal. 214, it appears that, in November, 1863, Neal was a settler upon certain public lands, and had made proof and payment under the pre-emption laws. The court said: "The patent issued to him on the twentieth of May, 1869, by the authorities of the United States, does not constitute a new title in him in that sense. It is merely a formal assurance of the estate which he had already acquired, by the proof and payment in November, 1863." (See, also, *Fowler* v. *Frisbie*, 37 Id. 495; and *Thompson* v. *Spencer*, 50 Id. 533.)

In *Stark* v. *Barrett*, 15 Cal. 361, the deed, which was executed by the grantor long anterior to the issuing of the patent, purported to convey the grantor's right, title, and interest in a tract of the land which was included in the patent; and it was held that, "the patent, in recognizing its validity of the grant, necessarily established the validity of

all properly executed intermediate transfers of the grantee's interest;" and in *McCauley* v. *Fulton*, 44 Id. 355, the court says, "the effect of that rule is to vest in such grantees the legal estate; and there is no rule in respect to the operation of such patents which is better understood than this."

In *Frink* v. *Darst*, 14 Ill. 306, it is said: "The case of *Jackson* v. *Fish*, 10 Johns. 456, was this: A soldier in the service of the United States, entitled to a donation of land for his services, transferred his claim to the same before receiving patent therefor, by a deed of quitclaim or release, and the court held that when the patent issued it was for the benefit of the releasee. The case was doubtless rightly decided, but it has no analogy to the one at bar. The soldier, at the time he executed the quitclaim deed, had a claim to the tract of land from the government, and most undoubtedly, when that claim was afterwards perfected by the issuing of a patent, it was for the benefit of him to whom the claim had been transferred. * * * Such a deed (quitclaim) will undoubtedly pass the land itself, if the grantor has an estate therein at the time of the conveyance, but it passes no estate which was not then possessed." See, also, 3 McLean, 109.

Under the facts admitted for the purposes of this discussion, our opinion is that, by his patent, Countryman acquired no right or interest in the land in question which he did not possess at the date of his deed to Boyle and Ridge; and that, upon the motion for nonsuit, plaintiff's rights should have been considered the same as they would have been if Countryman's deed had been a bargain and sale deed, or if it had been executed subsequent to the date of the patent.

4. It is next said that the title to the property in dispute never passed from Boyle and Ridge, or either of them, to plaintiff; that no conveyance is shown from Boyle, and that, in the deed from Ridge and the Washoe United Consolidated Gold and Silver Mining company, limited, the property is not described. The descriptive words in the last-named deed are as follows: "All the real estate, water rights, and property of every description, real and personal,

in the state of Nevada, belonging to the parties of the first part, or either of them, a particular description of a portion of which is as follows." * * * The property particularly described does not include that in question. In *Stanley* v. *Green*, 12 Cal. 166, the court used the following language: "It is undoubtedly essential to the validity of a conveyance that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence."

Upon the question of identity parol evidence is always admissible. (*Abbott* v. *Abbott*, 51 Me. 581; *Waterman* v. *Johnson*, 13 Pick. 261.) In the last case, the court said: "The parol evidence identifies the subject on which the deed operates, and then the estate passes by force of the deed. Suppose A. B. grants in these words: 'All the estate now in my occupation in —— street.' The very first step is to prove where the house occupied by the grantor was situated. But, then, another question arises; the grantee contends that the grantor occupied a dwelling-house and a stable adjoining, and the grantor denies it. The question must be determined by parol evidence; but as it is so determined, the house alone, or the house and stable, will be adjudged to have passed by the deed."

In *Jackson* v. *De Lancey*, 11 Johns. 365, the descriptive words in the mortgage under consideration were: "All and every those shares, lots, and parcels of land, and all other, the lands * * * and estate or estates whatsoever of said William, Earl of Stirling, whereof he is seized in common or separately and alone, in those several tracts of land called the patent of Cheesecocks, in Orange county, Richbell's patent, in the county of West Chester," etc., naming several other patents and their locations. Then followed these words of general description: "And all other, the lands, tenements, and hereditaments belonging to the said William, Earl of Stirling, within the province of New York." The premises in question passed, if at all, under the general description; the court held that the general description in

the mortgage was liable to no objection; that a party conusant of his rights might sell or mortgage by general description. In *Frey* v. *Clifford*, 44 Cal. 343, the descriptive words were: "All my right, title, and interest in Sacramento city, Upper California, consisting of town lots and buildings thereon." The court held the description sufficient to convey the lots in controversy.

In *Starling* v. *Blair*, 4 Bibb. 289, it was held that, "a mortgage of 'all the lots the mortgagor then owned in the town of Frankfort, whether he had a legal or equitable title thereto,' was not void for generality or uncertainty, but was good for all the lots which could be identified as belonging to the mortgagor at the date of the deed." The court thus commented upon general descriptions: "There may, indeed, be more difficulty in ascertaining the lots intended to be conveyed, where the language used in description is thus general, than if the lots had been designated by their numbers, but it is in the degree, and not in the nature, of the difficulty, that the two cases differ. It results in neither case from ambiguity on the face of the deed, but from extrinsic circumstances, and in both cases resort must be had to evidence *aliunde* for the purpose of identifying the lots which are the subject of the conveyance." We conclude that this objection is not valid.

5. It is next urged that there was no proof of the due execution of the conveyance introduced in evidence from the Nevada Land and Mining company to plaintiff. The statement on appeal declares that said deed was duly executed and acknowledged. But passing that fact, we do not think respondents can raise the point now under consideration for the purpose of sustaining the judgment of nonsuit. When the deed was introduced, it is true, the defendants made the same objection. But in their motion for nonsuit it was not stated or relied on as a ground therefor. The record shows that, after plaintiff rested his case, defendants moved the court for a judgment of nonsuit, on five grounds, which were stated specifically; and failure to prove due execution of the conveyance under consideration was not mentioned or referred to in general terms or

specifically. We think it would be unfair to plaintiff, and a practice that ought not to be sanctioned, to permit the introduction of the deed from that company, as a link in plaintiff's chain of title, and then sustain the judgment of nonsuit upon the ground now urged, which was not stated or relied on by the moving party. (*Jeffree* v. *Walsh*, 14 Nev. 146.)

If the deed was not competent to prove a conveyance from the company to plaintiff, it should not have been admitted, and if admitted, although improperly so, it should have been struck out. While it was in evidence, although objected to by defendants, plaintiff had a right to rely upon it as proof of conveyance to him. If defendants had again urged the incompetency of that deed upon the motion for nonsuit, and a failure to transmit the title to plaintiff, as a consequence, "due proof of its execution" might have been permitted by the court and made by plaintiff. The only grounds of nonsuit stated, which, it can be claimed, pointed in the slightest degree to the objection now urged, are as follows: "There is no proof that the land in controversy, at any time, belonged to Boyle or Ridge, or to both of them; the proof shows the title to the land in question, out of plaintiff, and not in him. No possession in any one has been shown of this land; the legal title thereto is now in Peter Countryman."

The defendants' claim, on the motion for nonsuit, was not that the conveyance from the Nevada Land and Mining company did not convey to plaintiff whatever title it had, but it was, that said company, and Boyle and Ridge, had no title to convey, because the patent to Countryman was executed subsequently to the date of his deed to Boyle and Ridge, and it was upon those grounds that the motion was granted. If defendants intended to rely upon the ground now urged in their motion for nonsuit, they would have so stated distinctly at the time, and failing to do so, under the circumstances, they waived the point. (*Mateer* v. *Brown*, 1 Cal. 222; *Baker* v. *Joseph*, 16 Id. 180; *Kiler* v. *Kimbal*, 10 Id. 268.) Besides, as was said in *Sharon* v. *Minnock*, 6 Nev. 385, the deed, upon its face, purported to be the deed

of the Nevada Land and Mining company, limited; and although its due execution was not proved, and its admission was objected to by defendants, still, it having been received in evidence, and not having been taken from the consideration of the court upon motion for nonsuit, it could very properly be held to be what it purported to be.

Counsel for respondents says in his brief that, "all objections were reserved by the court, and were argued and considered on the motion for nonsuit." The record does not show it if such was the fact. That only shows that the several deeds produced in support of plaintiff's case were introduced in evidence. Again, there was some oral testimony, admitted without objection after the introduction of the deeds, that the title was in plaintiff. He testified without objection that, he "claimed to be the owner of the lots in dispute; that on the seventh of December, 1876, he received a conveyance of this land, having purchased it of the Nevada Land and Mining company, limited, and from the mortgagees."

6. It is claimed that there was no competent proof of conveyance of the land in dispute by the United States to Countryman; that the duplicate purchase receipt was the best evidence. The proof made and received was a certificate of the register of the land office at Carson, wherein it was certified that Countryman filed his preëmption declaratory statement March 3, 1864, covering the land in question, and alleged settlement thereof of date December 21, 1863; that on March 2, 1865, Countryman made final proof and paid the purchase money (one hundred and eighty-eight dollars and twenty-eight cents) and received the usual receiver's duplicate receipt, showing said cash entry; that pursuant to said cash entry, a patent was issued by the government of the United States to said Countryman for said land February 5, 1869, and was recorded at Washington, in vol. 1, p. 359, records of the general land office. All of which appeared from the records in his office.

It was admitted by counsel for the defendants, at the trial, that the certificate contained a copy of the entries

that appeared on the books of the land office, in relation to the lands in question. We think, under the admissions, the certificate was competent evidence of the facts intended to be proven thereby. (Rev. Stats., U. S., 2 ed., secs. 906–2264; Copp's Pub. Land Laws, p. 192, sec. 34, and p. 768; Lester's Land Laws, pp. 50, 107, 430; *Kyburg* v. *Perkins*, 6 Cal. 675; *Gregory* v. *McPherson*, 13 Id. 572; Greenl. on Ev., vol. 1 (13th ed.), sec. 483 *et seq.*)

7. And lastly, it is urged in support of the nonsuit, that if plaintiff has any title or interest in the lands in dispute, he holds the same as tenant in common with Boyle, and that he can not maintain this action without uniting his co-tenant as a party with him. This action, except as to rents and profits, was for the possession only. It can determine no rights but those of present possession. (*Mahoney* v. *Van Winkle*, 21 Cal. 583.)

We have no doubt, upon reason and authority, that one tenant in common, who is seised *per mi et per tout*, and has an interest in the whole which entitles him to the enjoyment of the entire estate as against every one except his co-tenants, may maintain ejectment, in this state, against all persons but his co-tenants and parties claiming under them. (*Hart* v. *Robertson*, 21 Cal. 348; *Stark* v. *Barrett*, 15 Id. 371; *Touchard* v. *Crow*, 20 Id. 162; *Williams* v. *Sutton*, 43 Id. 71; *Smith* v. *Starkweather*, 5 Day, 210.) As to the mesne profits, he can recover, probably, only the proportion corresponding to his interest. (*Clark* v. *Huber*, 20 Cal. 196.)

Our opinion is, that the court below erred in granting a nonsuit, and the judgment is reversed.

PETITION FOR REHEARING.

R. M. Clarke, for Petitioner:

I. Under the pleadings plaintiff did not have such an interest in the land as entitled him to prevail in an action of ejectment.

II. It can not be maintained that the payment of the purchase money by Countryman, and the issuance of the receipt therefor, vested the legal title in Countryman, or took it out of the United States. (*Fenn* v. *Holmes*, 21 How.

Argument for Relator.

481; *Witherspoon* v. *Duncan*, 4 Wall. 218; *Gibson* v. *Chouteau*, 13 Id. 99.)

III. No recovery can be had upon an equitable title unless it be pleaded. (*Maguire* v. *Vice*, 20 Mo. 431; *Estrada* v. *Murphy*, 19 Cal. 248; *Blum* v *Robertson*, 24 Id. 141; *Brock* v. *Tucker*, 42 Id. 346.)

RESPONSE TO PETITION FOR REHEARING.

By the Court, LEONARD, C. J.:

After careful examination of the points urged for rehearing, the same is denied. (See 39 Cal. 586; 38 Id. 218; 45 Id. 17; 13 Wall. 295; 2 Minn. 171; 2 Saw. 455; 30 Cal. 648.)

[No. 1,065.]

THE STATE OF NEVADA, EX REL. G. A. RANKIN, DISTRICT ATTORNEY OF WASHOE COUNTY, *v.* B. F. LEETE, RESPONDENT.

STOCKHOLDER IN CORPORATION—WHAT CONSTITUTES.—G., sen., owned certain shares of stock in a corporation organized for the purpose of maintaining a ditch, etc.; he gave them to his son with the request that new certificates should be issued in his son's name, and transferred upon the books of the company. This request was complied with. The son paid nothing for the stock, the transfer being made in order that his son might be eligible to the office of trustee: *Held*, upon a review of the statutes of this state, that such a transaction constituted the son a stockholder in the corporation, and made him elegible to the office of trustee. (BELKNAP, J., dissenting.)

IDEM.—Under the statutes of this state a person who "holds" shares of stock, issued in his name, is recognized as a stockholder as well as one who "owns" them.

APPLICATION for *quo warranto*.

The facts are stated in the opinion.

Thomas E. Haydon and *G. A. Rankin*, for Relator:

I. The burden of proof was on defendant to establish his right to the office. (Ang. & Ames on Corp., sec. 756; *State* v. *Haskell*, 14 Nev. 210; High on Rem., sec. 629.)

II. The court did not err in striking out Gulling's evidence. The fact that the shares stood in the son's name by the consent of his father, entitled him to vote the stock. (*Bercich* v. *Marye*, 9 Nev. 316; *State ex rel. Pettinelli*, 10 Id. 144; Ang. & Ames on Corp., secs. 131, 132; Green's Brice's Ultra Vires, 126; *State* v. *Ferris*, 42 Conn. 560; *Gilbert* v. *Manchester Iron Works*, 11 Wend. 627; *Downing* v. *Potts*, 3 Zab. 66; *Union Bank* v. *Laird*, 2 Wheat. 390; *Shaw* v. *Spencer*, 100 Mass. 382; *Mechanics' Bank* v. *N. Y. & N. H. R. R. Co.*, 13 N. Y. 599; *Ex parte Holmes*, 5 Cow. 426; *Ex parte Wilcocks*, 7 Id. 402; *In re Barker*, 6 Wend. 509; *Merchants' Bank* v. *Cook*, 4 Pick. 405; *Hoppin* v. *Buffum*, 9 R. I. 513.)

III. Lee, as executor of Larcombe's estate, had a clear right to vote. (2 Comp. L. 3399; *Matter of North Shore etc. Co.*, 63 Barb. 571; *People* v. *Tibbetts*, 4 Cow. 364; *Bailey* v. *Hollister*, 26 N. Y. 112; *Middlebrook* v. *Bank*, 3 Keys, 135; Field on Corp., secs. 70, 71.

Lindsey & Dickson, for Respondent:

I. The court erred in ruling that the burden of proof was upon respondent. (*State* v. *Hunton*, 28 Vt. 594; *People* v. *Lacoste*, 37 N. Y. 192; *State* v. *Brown*, 34 Miss. 688; *State* v. *Kupferle*, 44 Mo. 154; 1 Comp. L. 394.) Respondent was once lawfully in the office. (14 Nev. 209.) The court erred in withdrawing the testimony of Gulling from the jury. (Authorities cited are found in the opinion of the court.)

II. The court erred in holding that John Lee, as executor of the Larcombe estate, could give a proxy to represent the stock belonging to that estate. (*Sebastian* v. *Johnston*, 72 Ill. 282; *Wilson* v. *Dennison*, 1 Ambl. 86; *Hawkins* v. *Kemp*, 3 East. 410; *Heyer* v. *Deaves*, 2 Johns. Ch. 154; *Tainter* v. *Clark*, 13 Met. 226; *Cole* v. *Wade*, 16 Ves. jun. 27; *St. Clair* v. *Jackson*, 8 Cow. 575; *Hawley* v. *James*, 5 Paige, 318; *Bulteel* v. *Abinger*, 6 Jur. 410; *Belote* v. *White*, 2 Head, 710; *Hunt* v. *Douglas*, 22 Vt. 130; *Burger* v. *Duff*, 4 Johns. Ch. 369.)

By the Court, LEONARD, C. J.:

The Orr Water Ditch company is a corporation, duly incorporated under the laws of this state, for the purpose of

constructing, keeping in repair, maintaining, and operating a ditch for the conducting of water from the Truckee river, in Washoe county, to farming lands therein, for irrigating and domestic purposes. On and prior to January 8, 1881, respondent was a stockholder in said corporation, and the duly elected trustee and secretary thereof. On the date just mentioned an election was held by the stockholders of the corporation, for the purpose of electing five trustees for the period of one year from February 1, 1881. There were two hundred and forty-eight votes in the corporation, and at that election two hundred and thirty-four votes were cast, of which, respondent, Frazer, and Manning received one hundred and nine votes each, and Charles Gulling, James Galt, and A. J. Smith one hundred and twenty-five each, one hundred and seven of which respondent admits were legal, but denies the legality of eight votes cast by Smith for himself, Galt, and Gulling, and ten votes cast for the same persons by Haydon, proxy for Lee, executor of the estate of Larcombe, deceased. Plaintiff admits that the one hundred and nine votes cast for respondent were legal. If the eight votes cast by Smith, or the ten votes by Haydon were legal, it follows that respondent was not elected, and that Smith, Galt, and Gulling were elected. The five persons declared elected directors were Haydon, Powell, Galt, Smith, and Gulling. As to the first two, there is no contention. After the election the five persons just named met as trustees, and Gulling was elected secretary of the board. He demanded of respondent the books, papers, and property belonging to the secretary's office, but compliance was refused, and this proceeding by information in the nature of a *quo warranto* was instituted in this court. Plaintiff demands judgment to the effect that respondent, is not entitled to the offices of trustee and secretary of said corporation; that he be ousted therefrom, and that Gulling be put in possession thereof, and of all books, papers, and property of the corporation appertaining to said offices of trustee and secretary, together with his costs. After the filing of respondent's answer, and upon an agreed statement of special issues of fact, the case

was sent to the second judicial district court in and for Washoe county, to be tried by a jury. The jury found for plaintiff, and thereupon judgment was entered in this court, according to the prayer of the complaint. Respondent asks for a new trial on the ground of several alleged errors in the court below.

It is claimed that, in the sense of the statute, Gulling was not a stockholder, and, consequently, was not eligible to the office of trustee. The statute provides that, "the corporate powers of the corporation shall be exercised by a board of not less than three trustees, *who shall be stockholders in the company*." If Gulling was not a stockholder, he was ineligible, and has no right to the office, or the books, papers, and property appertaining thereto, and respondent is entitled to retain the same until his successor, a stockholder in the corporation, is elected in his place.

The first question for our consideration, then, is this: Upon the facts admitted, is Gulling a stockholder in the corporation? We have carefully examined the statutes and decisions of the different states upon this question, and have come to the conclusion that the answer depends entirely upon a proper construction of our statute, for the reason that the incorporation law, under which this corporation was formed, provides that, "said incorporation, and the members thereof, shall be subject to all the conditions and liabilities herein imposed and to none others:" and the statutes of other states, which have been construed by the courts, differ so materially from ours, that the decisions thereon furnish but little light for our guidance.

The point of contention under consideration arises upon an exception taken by the respondent to the action of the court below in striking out all of Gulling's testimony except that which showed that eight shares of the stock of the corporation stood in his name upon the books of the company at the time of the election. We shall concede that the testimony struck out tended to show that Gulling's father owned sixteen shares of the stock; that he handed the certificate to his son, Charles Gulling, and requested the latter to have eight shares put in a new certificate in his name

and transferred to him upon the books of the company for the purpose of making him a stockholder and eligible to the office of trustee, and that he never paid anything for the stock.

Did such an ownership or holding of stock make Charles Gulling a stockholder according to the legislative intent? Counsel for respondent claim that the testimony struck out tended to show that his ownership was only colorable, while under the statute he must be a stockholder holding and owning the stock in his own right, in order to be eligible to the office of trustee; and that respondent had the right to go behind the book title to ascertain if he was a stockholder in the sense above stated. The court below took a different view, and held that Gulling, who undoubtedly had all the muniments of a perfect legal title to the eight shares, and who acted according to his father's wishes, was a stockholder under the statute. We think the court was right. The word "stockholder" is not defined by the statute, nor is it required, in terms, at least, that a person to be eligible to the office of director shall be a *bona fide* stockholder, or that he shall own stock absolutely in his own right. He must, however, be "a stockholder in the company."

Counsel for respondent say: "If the mere fact that the stock stands on the books in the name of one, makes him eligible to the office of trustee, irrespective of the question whether or not he has any interest in it, the object of the statute is so readily evaded that it becomes a dead letter." It is a part of the history of corporations in this state, that under the statute of 1862, in force at the time our general incorporation law was passed (March 10, 1865), a person was considered and treated as a stockholder by corporations, if he appeared as such upon the books of the company. Except as to the liabilities of stockholders for their proportion of the debts of the corporation, the present statute is similar to the former one; and as to the qualifications of directors, no change was made. If the legislature intended that a director should own stock absolutely in his own right, it ought, at least under such circumstances, to

have so declared in unmistakable language. But other legislation of the session of 1865 tends to show that the construction contended for by counsel for respondent was not intended. In the statute providing for the incorporation of railroad companies, etc., approved March 22, 1865, only twelve days after the approval of the general incorporation law (Comp. L. 3425), it is enacted, in section 3429, that "no person shall be a director, unless he shall be a stockholder owning stock absolutely in his own right, and qualified to vote for directors at the election at which he may be chosen;" and to vote he must own stock ten days before election. To my mind it is significant, that, in the face of a known custom contrary to respondent's theory, the general incorporation law was re-enacted in respect to the qualification of directors, while in the railroad law, it was specially declared that every director should be a stockholder owning stock absolutely in his own right. The fact that in the railroad law the legislature, *ex industria*, made absolute ownership the test of eligibility, is strong evidence that in the general law, where that test was excluded, the same rigor was not intended.

But why is it unreasonable to suppose that, our legislature intended to recognize as stockholders those persons who should hold certificates of stock in their own names, and in whose names the stock should stand upon the books of the company, although, as between themselves and outside parties, there might be private agreements and peculiar equities, when state after state, noticeably New York and New Jersey, in terms, enacted the same thing? (See 1 Rev. Stats. N. Y. for 1829, p. 603, sec. 6, and for 1836, p. 605, sec. 6; Nixon's Dig. of Laws, N. J. 1809–1861, p. 153, sec. 13. In the latter state it is enacted that, the books "shall be the only evidence who are stockholders of such company entitled * * * to vote in person or by proxy, at any election for directors of said company.

The charter of the Providence and New York steamship company provided that, only stockholders were eligible as directors, and the by-laws provided that, only those stockholders should be entitled to vote at meetings as should,

according to the company's stock ledger, have been holders of stock for ten days next preceding such meeting. In *Hoppin et al.* v. *Buffum et al.*, 9 R. I. 517, it appears that a certain number of shares in the corporation, owned by Edward P. Taft and Cyrus Taft, were pledged to Earl P. Mason, as security for debts due to himself and others, but neither the ownership nor pledge appeared on the books, where the stock had, from the formation of the corporation, stood in the name of "Earl P. Mason, trustee." The certificate was so issued in 1867, and he voted until 1870, without objection.

The court said: "A person who pledges stock has the right to vote upon it, until the title of the pledgee to the stock is perfected. If Taft had appeared on the books as owner, and the books had shown the pledge, Mr. Taft's right to vote could not have been disputed. The object of the stock book and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and for no purpose is it more important than to enable it to know who are entitled to vote in case of an election. This doctrine is recognized by many authorities directly, and by many impliedly. * * *"

If the real owner wishes to have his name, or the true state of facts, appear on the books, he has his remedy in equity to compel a proper transfer, or to compel the pledgee to give a proxy, as was done in the case of *Vowell* v. *Thompson*, 3 Cranch, C. C. 428. * * * In the present case, the stock stood in the name of "Earl P. Mason, trustee." The books did not disclose the nature of the trust.

If any other person was the equitable owner of the stock, and entitled to have it transferred to him, he should, if his right was disputed, assert it in season, and take the proper measures to enforce it. But if the trust was of such a nature that the trustee has the control and management of the property, and is to exercise his discretion concerning it, then he is the proper person to represent and vote upon it, and the corporation can not be required to examine into the nature of the trust with a view to decide as to the right to vote."

But the intent of the legislature must be gathered from the law itself. Let it be remembered that Charles Gulling held the entire legal title to eight shares; the certificate was in his name and the transfer was entered upon the company's books. If he is not a stockholder, it is because such ownership or holding of stock does not satisfy the statute. It is just as true that stockholders and none others can vote, as it is that directors must be stockholders. If Gulling was a stockholder he could vote and act as director; otherwise he could do neither.

Section 3393, Comp. L., provides that, "each stockholder, either in person or by proxy, shall be entitled to as many votes as he or she may 'own,' or represent by proxy, shares of stock;" and it is argued therefrom that an absolute owner in his own right only is a stockholder or can vote. It will be seen that the words "own" and "hold" are used in the statute in the same sense. For instance: Shares of stock "held or owned" by a married woman "may be transferred by her without the signature of her husband;" and all dividends payable upon shares "held" by a married woman may be paid to her in the same manner as if she were unmarried; and any proxy given by a married woman touching any share of stock "owned" by her shall be valid and binding. (Comp. L. 3397.)

"If, after such notice has been given, any stockholder shall make default in the payment of the assessment upon the shares *held* by him, so many of such shares may be sold as will be necessary for the payment of the assessment upon all the shares *held* by him, her, or them." (Comp. L. 3398.) "It shall be the duty of the trustees of every company incorporated under this act to keep a book containing the names of all persons, alphabetically arranged, who are, or shall become, stockholders of the corporation, and showing the number of shares of stock *held* by them respectively and the time when they became the *owners* of such shares." (Id. 3404.)

So, it is evident, that one who "holds" shares of stock is recognized as a stockholder as well as one who "owns" them; and in the portion of section 3393, before quoted, the

word "hold" may be substituted for "own," when it would read thus: "Each stockholder, either in person or by proxy, shall be entitled to as many votes as he or she may *hold*, or represent by proxy, shares of stock."

It must be admitted that the legislature intended, either that all who, as to third parties, "hold" stock in the sense of the statute—that is, by certificate in their own names, with proper transfer upon the books—should also own it absolutely in their own right, in order to be stockholders, or that all should be considered such who hold it as above stated, notwithstanding there are private agreements and equities between them and others. As before stated, we think the latter view is correct. Section 3397 provides, that the capital stock of a corporation, when it is divided into shares, shall be personal estate, and that "such shares may be transferred by indorsement and delivery of the certificate thereof, * * * but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer."

Under that statute, the whole title passes to the transferee so far as the transferrer is concerned, without an entry upon the books; but, as to everybody else, the legal title remains where it was before the transfer. (*Bercich* v. *Mayre*, 9 Nev. 316; *State* v. *Pettinelli*, 10 Id. 144; *Weston* v. *The Bear River and Auburn Water and Mining Company*, 5 Cal. 186.) In the absence of other provisions modifying their natural import, those last quoted, in connection with other sections of the statute, and especially 3404 and 3398, show conclusively to my mind that, as to the corporation and other third parties, the legislature intended to have the books show the names of stockholders, and that, as to such third parties, persons holding the legal title and having control of the stock should be considered stockholders, except in cases where the same may have been obtained by fraud or other unfair means.

It will not be denied that delinquent stock can not be

sold for assessments without notice to stockholders holding the same; yet section 3398 provides that, notice may be given *personally* or by publication, and if, after notice, any stockholder shall make default in the payment of the assessment upon all the shares held by him, so many of such shares may be sold as will be necessary to pay the whole assessment due. Personal notice is as effective as notice by publication. The secretary has no means of knowing who are stockholders, except by an examination of the books, and he has a right to rely upon them as giving him correct information. If he gives personal notice to a party appearing to own shares upon the books, or if he publishes the delinquent stock in the name of such party, and the assessment is not paid, the necessary number of shares may be sold, although they may have been transferred by indorsement and delivery only, before the assessment was levied or the notice given. How, then, can it be said that the legislature did not intend to regard as stockholders persons appearing upon the books and holding stock as such? In this case the whole stock is held, probably, by persons residing in Washoe county, and in case of assessment they may all be served personally with notice. Charles Gulling holds the legal title to eight shares, and appears, upon the books, to be the absolute owner. Either he or his father had the right to cast eight votes upon them, because one or the other was, as to them, a stockholder.

Those shares may be assessed, regardless of the stockholder, and notice may be given, as before stated, to Charles Gulling; but if counsel for respondent are right in claiming that the father is the stockholder, then, before sale, notice should be served upon him, because "notice shall be given to the stockholders, personally or by publication." If it be said in answer that the father would be estopped to deny his own voluntary transfer, still, in that view, the intention of the legislature is not less apparent.

The case cited by counsel for respondent (*State* v. *Hunton*, 28 Vt. 595) is not opposed to our interpretation. The general banking law of that state enacted that no stockholder *residing out of the state* should, either personally or by proxy,

vote in the meetings of the corporation; and that a stockholder of four shares should have four votes; six votes for eight shares; seven votes for ten shares, and one vote for every five shares above ten; *provided*, that no stockholder should be entitled to more than twenty votes. (Comp. Stats. of Vermont for 1850, p. 489, sec. 54.)

Prentiss, a citizen of New Hampshire, advanced to Danforth and others, citizens of Vermont, a large sum of money, which was expended in the purchase of a major part of the stock of the White river bank; and conveyances of the stock were made to citizens of Vermont, and by them parceled out to other citizens, giving generally, to each, four shares. More than five hundred shares were thus distributed. The court decided, upon ample proof, that Prentiss was the real owner, and that the pretense that it belonged to any one else was altogether colorable; that if the stock had stood in his name he could not have voted upon it; that to allow him to do so, would be a fraud upon the law, which should not be outwitted by cunning devices. In other words, it was decided that Prentiss could not do by indirect means, what the law declared should not be done directly. The court said the statute showed a marked intention on the part of the legislature that the banks should be controlled only by citizens of the state. And we say, if our statute had declared that none should be directors but stockholders holding or owning stock absolutely in their own right, or had used language indicating such intention, upon a fair consideration of the entire statute, we should have no difficulty in arriving at the conclusion of the Vermont court. *Stewart* v. *Mahoney M. Co.*, 54 Cal. 149, and the decision of Judge Sullivan upon the application of Dewey to set aside the election of directors of the California Mining Company, in one of the superior courts of San Francisco, are also cited. We think neither case is authority for respondent under our statute.

When the first was decided, section 298 of the civil code provided as follows:

"The *owners* of shares in a corporation which has a capital stock are called stockholders. If a corporation has no

capital stock the corporators and their successors are called members." And section 312 provided that, "Every person acting therein (elections), in person or by proxy, or by representative, must be a member thereof, or a *bona fide* stockholder having stock in his own name on the books of the corporation at least ten days prior to the election. Any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent stockholders or members, and may be set aside. * * *"

That is to say, under the statute, no person could vote who was not a *bona fide owner* of shares of stock, or a member; and an election carried by the votes of other persons could be set aside. One thousand shares of the stock voted, stood in the name of "H. P. Bush, trustee." They were owned by three other parties, neither of whom authorized Bush to represent them, or, in fact, knew of the meeting. The stock had been issued in the name of Bush, trustee, without the knowledge or authority of the owners. After citing section 312 of the civil code, the court said: "Bush was not the proxy or representative of either of the owners of the stock, nor was he a member of the corporation, nor was he a *bona fide* stockholder; therefore he had no legal right to vote the stock." The court evidently took the view that there was a statutory prohibition against the voting of any but *bona fide owners* of stock, and that therefore, Bush's votes were illegal—a conclusion with which we cordially agree, under the statute, and, especially, under the circumstances shown.

At the time of Judge Sullivan's decision the statute was as follows: "At such election the stock of said corporation shall be voted by the *bona fide* owners thereof, as shown by the books of said corporation, unless the certificate of stock, duly indorsed, be produced at such election, in which case said certificates shall be deemed the highest evidence of ownership, and the holder thereof shall be entitled to vote the same." (Cal. Stat. 1880, 132, sec. 3.) It was claimed that the books of the company were the highest and only evidence of ownership. Judge Sullivan held that proof of ownership could be made outside of the

books under the last statute as well as the first. The case being appealable, it would be in bad taste for us to comment upon the decision, and we refrain from so doing.

The conclusion arrived at in relation to the *status* of Gulling, renders it unnecessary to consider at length the alleged erroneous rulings of the court concerning the validity of the votes cast by Haydon, proxy for Lee, executor of the estate of Larcombe. As to the corporation and other third parties, Lee held the legal title to ten shares, and the stock issued in his name was held by him, although it belonged in fact to the estate of which he was executor. He was a stockholder, and being such, had the right to vote in person or by proxy. The errors complained of touching the validity of Smith's votes need not, therefore, be considered. As to the alleged error in ruling that the burden of proof was upon respondent, it is sufficient to say that, if it was erroneous, it was, under the admissions, without injury.

We have considered this case upon the facts presented, and intimate no opinion as to what the result would have been if Gulling, the father, had demanded the right to vote the eight shares held by, and in the name of, his son.

New trial denied.

BELKNAP, J., dissenting:

In order to have been eligible to the directorship, Gulling must have been a stockholder, and this fact should have been determined by the same rules of evidence as in general govern courts in the determination of controverted questions of fact. The rule of evidence upon this subject has been changed in some states by express provision of statute or authorized by-law making the entries in the transfer books conclusive evidence of the right of a person to vote the shares standing therein in his name (as was the case in *Hoppin* v. *Buffum*, referred to in the opinion of the court), but when this express authorization does not exist no case has gone farther than to hold the entries in the transfer books *prima facie* evidence of ownership.

Nor do I think the statute of this state was intended to

change the general rule of evidence upon the subject. Section 5 of the corporation act contains a provision that the trustees of the corporation shall be "stockholders in the company." The same section provides that "each stockholder * * * shall be entitled to as many votes as he or she may own * * * shares of stock," etc., and section 12 provides that the pledger of stock may nevertheless represent and vote his stock at all corporate meetings. These provisions indicate an intention on the part of the legislature to intrust the owners of the stock of the corporation with the control of its elections and its general management, in accordance with a principle which has the sanction of long continued usage, and which is so firmly engrafted into the law of corporations that it may be said to be a part of their common law.

In the absence of an intention on the part of the legislature to alter or define the meaning of the word "stockholder," as used in the statute, it should be assumed to have been used in its universally accepted sense, and to mean the owner of the shares. If, therefore, Gulling did not own the shares, he was ineligible to the directorship.

The question whether one in whose name stock stood upon the books of the corporation was from that fact to be treated as a stockholder for the purpose of voting at corporate elections, arose in Vermont, under a statute which, among other matters, provided that "each stockholder shall be entitled to a number of votes proportional to the number of shares which may have been held by such stockholder at least three months before the time of voting," etc., and which further provided that no stockholder residing out of the state should be entitled to vote at corporate meetings. The facts were that a citizen of another state, in order to obtain the control of the directory of a banking corporation of the state of Vermont, caused certificates of stock of which himself was the true owner, to be placed in the names of citizens of the latter state, friendly to his plan, and who voted the stock so transferred to them in accordance with his wishes. The court held that the votes so cast should have been rejected, because the citizens of the state of Vermont were not in fact

the owners of the stock, the transfer to them having been made simply for the purpose of enabling them to vote upon it. (*State* v. *Hunton*, 28 Vt. 594.)

The analogy between this case and the one under consideration appears to be very close. In both cases it was claimed that the transfer was simply colorable and for the purpose of conferring an apparent eligibility to the positions of stockholder and director. If importance is to be attached to the word "held" as against the word "owned," the Vermont statute authorized the stockholder to vote the shares *held* by him, whilst the statute of this state entitles him to vote the shares *owned* by him.

In Ohio, when the charter of a banking corporation provided that stockholders only should be elected directors, it was held that the transfer of shares to persons for the purpose of making them eligible to the directorship, who had no interest in the stock, neither made them eligible for directors nor qualified stockholders. (*Bartholomew* v. *Bentley*, 1 Ohio St. 37). The same principle was decided in the case of *Vowell* v. *Thompson*, 3 Cranch's C. C. 428, where it was held that the mortgagor of stock in an insurance company, who had transferred his stock to another as collateral security for a debt, was entitled to vote upon the stock at an election of directors, he being considered the owner thereof, and the court compelled the mortgagee to give the mortgagor a proxy for this purpose. To the same effect is *Merchants' Bank* v. *Cook*, 4 Pick. 405.

In New York, under a statute providing "in all cases where the right of voting upon any share or shares of the stock of any incorporated company of this state, shall be questioned, it shall be the duty of the inspectors of the election to require the transfer books of said company, as evidence of stock held in said company, and all such shares as may appear standing thereon in the name of any person or persons, shall be voted on by such person or persons, directly by themselves, or by proxy," courts have allowed parties to go behind the entries in the transfer books for the purpose of determining the ownership of shares for the purpose of voting. This was the ruling in *Ex parte*

Holmes, 5 Cow. 428, and also in the *Matter of the Long Island Railroad Company*, 19 Wend. 37. In the latter case one Lord was the owner of a large number of shares of stock of the company by assignment from individuals, in whose name the shares stood upon the transfer books. He applied to the company to have the stock transferred to himself, but was refused for the reason that the stock, under a by-law of the company, had been declared forfeited for non-payment of calls. At the election he offered to vote the shares and was refused. If his vote had been received it would have changed the result of the election. The court, being of opinion that the by-law was invalid and that Lord's vote was improperly rejected, ordered a new election.

And in a late case the supreme court of New York held that the provision of the statute of that state above set forth was intended to be conclusive only upon the inspectors of election, and that courts had the power, and it was their duty, to go back of the entries in the transfer book and inquire into the rights of holders of disputed shares to vote upon them. In that case the shares stood upon the transfer books in the name of one to whom they had been pledged. The judge who held the special term considered that this fact precluded all inquiry as to whether the transfer was an absolute sale or a mere pledge, but the general term reversed the judgment, saying: "We are of opinion that the special term erred in holding that it had not power to determine the question whether the transfer of the shares was a sale or a pledge, and whether the appellant had the right to vote upon them, notwithstanding they stood upon the transfer book in the name of the respondent." (*Strong* v. *Smith*, 15 Hun, 222.) The judgment of the general term was subsequently affirmed by the court of appeals. (80 N. Y. 637.)

The corporation act of this state was adopted from the state of California, and before its adoption had received a judicial construction from the supreme court of that state. When a statute has received a judicial construction, and is afterwards adopted by another state, the construction as well as the terms of the statute will be deemed adopted. In

such cases it is presumed that the legislature intended to adopt the received construction; different language would have been employed had the intention been to exclude it.

In *Allen* v. *Hill*, 16 Cal. 114, certificates of stock owned by the firm of Hill & Devane, stood in the name of Devane. After Devane's death, the question arose whether the surviving partner or the administrator had the right to vote the shares. The estate being unsettled, the surviving partner had the right to continue in possession of effects of the partnership under the statute of that state regulating the settlement of the estates of deceased persons, but the question was whether his right to vote the stock was affected by the fact that it stood in the name of Devane alone. Upon this point the court said: "We think that no consequence is to be attached to the circumstance that a portion of the stock represented by Hill stood upon the books of the corporation in the name of Devane alone. This was *prima facie* evidence that it belonged to the separate estate of Devane, but it was competent for the defendants to show that it was in fact the property of the partnership. The cases cited from New York proceed entirely upon a statute of that state, and the reasoning in some of these cases indicates very clearly that in the absence of the statute the conclusion would have been different. * * * It would seem, upon principle, that the real owner of stock should be entitled to represent it at the meetings of the corporation, and that the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so."

In the subsequent case of *Brewster* v. *Hartley*, 37 Cal. 15, the court allowed the plaintiffs to go behind the entries in the certificate book for the purpose of ascertaining the ownership to certain shares, and upon determining that the corporation itself was the real owner of the shares which had been voted by a trustee in whose name they stood, ordered the election set aside.

Section 3397, touching transfers of stock and providing that no transfer shall be valid, except between the parties thereto, until the same shall have been entered upon the

books of the corporation, does not affect the question presented by this case. A similar provision is contained in the corporation statutes of other states, and is intended for the protection of the corporation in the enforcement of its lien for assessments or other debts. Under it no transfer, unless entered upon the company's books, can affect its rights.

The legislature did not intend by this clause that all transfers, except as between transferrer and transferee, should be invalid unless entered upon the books of the company, but that such transfers should be valid as against the whole world except the corporation or subsequent purchaser in good faith without notice. (*Parrott* v. *Byers*, 40 Cal. 614; *Com. Bank of Buffalo* v. *Kortright*, 22 Wend. 362; *Bank of Utica* v. *Smalley*, 2 Cow. 778; *Gilbert* v. *Manchester Iron Co.*, 11 Wend. 628.)

The requirement of sec. 3404, that the trustees shall keep a transfer book containing the names of the stockholders, which shall be accessible to stockholders and creditors, was contained in the original corporation act of 1862, of which the present law is amendatory. Under that law a personal liability was imposed upon stockholders, and this section appears to have been intended for the protection and information of the creditors of the corporation as well as the stockholders, who were liable to become creditors in case of corporate insolvency. This section now contains the only express requirement relative to the keeping of the transfer book, and whatever other purpose it may perform it bears no relation to the question of the evidence that shall be received to establish the fact whether one is or is not a stockholder.

I am of opinion that the parol evidence touching Gulling's ownership of the shares should not have been withdrawn from the consideration of the jury, and, therefore, dissent from the judgment of the court.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

OCTOBER TERM, 1881.

[No. 987.]

L. B. ABERNATHIE, APPELLANT, *v.* CON. VIRGINIA M. CO., RESPONDENT.

COMPROMISE OF INTEREST IN MINING GROUND—AUTHORITY TO MAKE—ACQUIESCENCE IN.—Where a compromise is made between several persons as to the respective interests which each shall have in certain mining ground, W., one of said parties, being represented by G., and where all the parties to the compromise, including W., for a period of fifteen years, abided by its terms and acted upon it, and conveyed their interests in the ground in accordance therewith, and received the proceeds thereof: *Held*, that these circumstances, in connection with the fact that the defendant at the trial maintained the validity of the compromise which it alone, as the successor of W., could have attacked, rendered the question of G.'s authority to act for W. immaterial to the plaintiff's case.

IDEM—HOW INTERESTS OF PARTIES MAY BE DETERMINED—INSTRUCTION.—The court instructed the jury: "To support the statement of any of the witnesses, you can consider the probability of his evidence and the facts to which he testifies, and any facts or circumstances detailed which might tend to corroborate or sustain the statement of any witness; and you may also take into consideration any description or calls in the deeds introduced in evidence, and the manner, conduct, and action of the original owners in relation to the ground, in determining the question whether or not the plaintiff and his associates each owned more than one hundred feet in the Sides claim," etc.: *Held*, upon the facts of this case, to be correct.

Argument for Appellant.

IDEM—ASSESSMENT BOOK ADMISSIBLE IN EVIDENCE.—The Sides company was an unincorporated association. It had officers, kept a record of its meetings, and an assessment book which contained a list of all the owners of the Sides claim, with each of whom was kept an account showing the amount of assessment levied and the payments made. This book was, at all times, open to inspection, and no objection had ever been made thereto. The court instructed the jury that if they believed plaintiff had actual knowledge of its contents they could then consider the entries mentioned as admissions of the extent of his ownership: *Held*, that the instruction was correct.

STATUTE OF LIMITATIONS—POSSESSION OF TENANT IN COMMON—WHEN ADVERSE—NOTICE.—To make the possession of one tenant in common adverse as against the others, it is not necessary that notice should be given of the adverse intent; but the intent must be manifested by outward acts of an unequivocal kind.

IDEM—PLAINTIFF NOT TENANT IN COMMON.—The Sides company did not enter as tenant in common with plaintiff; but as owner of the entire claim. It never acknowledged plaintiff's title, but held under an avowed claim to the whole and in exclusion of plaintiff: *Held*, that its possession was adverse to plaintiff from its inception.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

A. C. Ellis, for Appellant:

I. There never was any compromise agreed upon between plaintiff or Sides, and Gregory acting for Winters. Gregory was never authorized to make any compromise whatever, by which Winters was to alienate or acquire any mining ground on the Comstock. Gregory should have been authorized in writing to alienate this property, or if he acted without authority in writing,his acts should have been ratified by Winters, either directly, or in some way acquiescing, accepting the fruits of the transaction, or doing something which, as matter of law, would operate as a ratification. Of all this, there is a total absence of testimony.

II. The instruction of the court relative to the deeds and the recitals therein, was error, and misled the jury. The testimony was inadmissible, and incompetent for the purposes for which it was admitted. As a contemporaneous assertion of the assumed fact, that a compromise was made

with Gregory, and for Winters, it was as inadmissible as if it had been made by a stranger to the ground and to the common source of title.

III. The books of the company organized to develop the ground, were inadmissible in evidence. They are in no respect a declaration or admission by plaintiff or Sides, that they each had so many or such a number of feet as, added to what they had deeded to others, would make a hundred feet. The instruction touching this subject was clearly error. No estoppel is set up. It can not be shown that any grantor of defendants would have been deprived of any feet by any recognition plaintiff or Sides made of title in Winters; it has not been shown that any one ever acted on any such recognition. No estoppel can arise against a party not fully advised or acting under mistake.

IV. The statute of limitation does not apply to this case. The possession of one tenant in common is the possession of all. Actual ouster at a time more than five years before the commencement of the action, was not shown. The possession of the defendants and grantors has been a mere silent possession. No acts of defendant or its grantors were shown, other than mere quiet occupancy of portions of the claim. There is no proof that officers or even stockholders of the Sides corporation ever declared to anybody, much less plaintiff or Sides, that such corporation claimed and occupied adversely to plaintiff or Sides. The charge of the court on this point was error, and the verdict may have been on limitation alone. (*Miller* v. *Meyer*, 46 Cal. 535; *Coleman* v. *Clements*, 23 Id. 245; *Owen* v. *Morton*, 24 Id. 373; *McClung* v. *Ross*, 5 Wheat. 116; *Clymer* v. *Dawkins*, 3 How. 674; *Abercrombie* v. *Baldwin*, 15 Ala. 363; *Blakeney* v. *Ferguson*, 20 Ark. 547; *Colburn* v. *Mason*, 25 Me. 434; *Jackson* v. *Tibbetts*, 9 Cow. 241; *Clapp* v. *Bromaghan*, Id. 530; *Gray* v. *Givens*, Riley (S. C.), 41; *Bayley* v. *Tramnell*, 27 Tex. 317; *Buckmaster* v. *Meedham*, 22 Vt. 617; *Holley* v. *Hawley*, 39 Id. 525; *Buckman* v. *Buckman*, 30 Me. 494; *Warfield* v. *Lindell*, 30 Mo. 272; *Chandler* v. *Ricker*, 49 Vt. 128; *Squires* v. *Clarke*, 17 Kan. 84; *Ball* v. *Palmer*, 81 Ill. 370; *Linker* v. *Benson*, 67 N. C. 150; *Brooks* v. *Fowle*, 14 N. H. 248; *Wilson*

v. *Watkins*, 3 Pet. 51; *Manchester* v. *Doddridge*, 3 Ind. 360; *Ruffner's* v. *Lewis*, 7 Leigh (Va.), 720; *Roberts* v. *Morgan*, 30 Vt. 319.)

C. J. Hillyer, for Respondent:

I. The court did not err in instructing the jury relative to the deeds offered in evidence. The instruction permitted the jury to consider only the descriptions and calls, and not the recitals in the deeds. The calls and descriptions, and in fact the recitals of their deeds, were unquestionably competent evidence to contradict the testimony of Sides and Belcher. All the deeds of the co-locators of plaintiff, with their calls and descriptions, were admissible as part of the *res gestæ*. The calls and descriptions were evidence, not of declarations, but of acts. The controverted point was, whether the compromise had been made, and whether the parties held under that compromise or otherwise. Upon this point the actions and conduct of the parties in respect to the claim were not only competent, but the best evidence. The making of a deed with certain calls and definitions was as much an act as work upon the claim or the payment of an assessment. We were as clearly entitled to prove, and the jury to consider, the former as the latter.

II. The assessment book of the Sides association was admissible in evidence. Abernathie was a member of the company; the secretary who kept the books was his agent. He was chargeable with knowledge of the contents of the books, whether he had actual knowledge of them or not. (1 Greenl. Ev., sec. 493; *Allen* v. *Coit*, 6 Hill, 318.) At the trial defendant expressly disclaimed any intention to prove or rely upon an estoppel. The purpose of the testimony was to establish the main fact that the compromise had been made, and ownership in accordance therewith. It went to the existence and extent of the plaintiff's title, and not in the least to his right to assert any title which he in fact had.

III. The instructions relative to the statute of limitations were correct. If the occupation of the Sides company was exclusive, then the intention to hold adversely might be in-

dicated by acts sufficiently significant and notorious to charge the plaintiff with notice and set the statute in motion, whether he had actual notice or not. (See authorities in opinion.)

IV. But there is another view which disposes of this subject. There was nothing in the relation which existed between the Sides company and the plaintiff and his grantor in respect to the interest in controversy, which required any different character of evidence to establish an adverse possession than is required between strangers. It is only where a person derives title to an undivided portion of the premises, or in some similar manner admits the ownership of others as co-tenants with him, that the rule distinguishing the character of acts necessary to constitute adverse possession has any operation. But the reason, and with it the rule, ceases where one enters and takes exclusive possession under a conveyance to him of a title to the entire premises. Under these circumstances he sustains no fiduciary relation to others claiming adversely to him either the whole or some undivided interest. The Sides company was the purchaser of the entire claim of five hundred feet. It derived its title from persons who, at the time of its purchase, professed to own and possess the whole five hundred feet. The conveyances from its grantors were, at the time of its purchase, placed on record. These recorded conveyances were of themselves notice to the plaintiff and his associates that the entry and possession of the corporation were adverse to any title which they then had or claimed. (See authorities in opinion.)

By the Court, BELKNAP, J.:

The plaintiff having filed his protest in the United States Land Office against the issuance of a patent by the government to the defendant for the mining ground described in the complaint, thereafter brought this action to determine the right of possession thereto, in compliance with the requirements of the mining laws of congress. A trial in the district court resulted in a verdict for the defendant, and from the judgment thereupon entered and an order denying

a motion for a new trial plaintiff has appealed. The errors assigned will be considered in the order in which they have been presented.

Appellant, in the first place, insists that the evidence is insufficient to justify the verdict. To reach an understanding of this point it is necessary that some of the facts developed at the trial should be stated.

The action involves the right of possession to an undivided fifty feet of the south five hundred feet of the Consolidated Virginia mine on the Comstock lode. This five hundred feet was located by Sides, Baldwin, Belcher, and plaintiff in the month of June, 1859, and was known as the Sides ground or claim. Plaintiff's theory is, that this claim originally embraced eight hundred feet; that after its location a fear existed among its owners that at a threatened meeting of the miners of the district its length would be reduced to five hundred feet, and in order to frustrate such action and prevent the excess over five hundred feet from becoming subject to occupation by strangers, they conveyed it to some of their friends, and the claim thus segregated was thereafter known as the Best and Belcher claim; that the interests of plaintiff and of his co-locators thereby became reduced to one hundred and twenty-five feet each, and that these several interests have been reduced by conveyances to twenty-five feet each, which amount of ground they now own, excepting Sides, who sold his twenty-five feet to plaintiff's grantor shortly before the commencement of this action.

The defendant contends that during the month of June, 1859, John D. Winters claimed to own three hundred feet of the ground embraced in the Sides location, and that pending such adverse claim Winters sold an undivided half of his interest to one James O. Gregory. Thereupon Gregory proceeded to the premises for the purpose of representing his own and Winters' interest. Shortly afterwards the conflicting claims were compromised by plaintiff and his associates agreeing with Gregory, for himself and Winters, that the ground should be divided into five interests, of one hundred feet each; that plaintiff and his associates should

each be entitled to an undivided one hundred feet, and that the remaining undivided one hundred feet should be owned by Gregory and Winters. Defendant concedes the fact of the segregation of the Best and Belcher ground, as claimed by plaintiff.

The particulars in which the evidence is alleged to be insufficient is, that it nowhere appears that Gregory had authority from Winters to adjust the differences mentioned. If this compromise was made, and from the verdict we must assume that it was, it matters not to plaintiff whether Gregory was or was not authorized to make it. From the year 1859 until the year 1875, the locators of the Sides ground abided by the terms of the settlement made; under it the plaintiff and Sides, as well as Baldwin and Belcher, received without molestation the one hundred feet to which each was entitled, and severally made conveyances down to March, 1863, by which each of them alienated, in the aggregate, the significant interest of one hundred feet, to which he was entitled under the compromise.

Upwards of fifteen years has elapsed since each received the proceeds of such sales, and no one of them has ever been interrupted in the enjoyment thereof. Neither they nor their grantees have ever been molested in the possession of the respective interests received under the terms of the compromise, and in the year 1865 Winters conveyed to plaintiff's grantee whatever interest he then had in the Sides ground. These circumstances, connected with the further fact that the defendant at the trial maintained the validity of the compromise which it alone, as the successor in interest of Winters, could have attacked, rendered the question of Gregory's authority immaterial to the plaintiff's case.

The second assignment of error consists in the giving of an instruction to the jury containing in part the following language: "To support the statement of any of the witnesses you can consider the probability of his evidence and the facts to which he testifies, and any facts or circumstances detailed which might tend to corroborate or sustain the statement of any witness; and you may also take into consideration any description or calls in the deeds intro-

duced in evidence, and the manner, conduct, and action of the original owners in relation to the ground, in determining the question whether or not the plaintiff and his associates each owned more than one hundred feet in the Sides claim," etc.

At the trial the defendant introduced in evidence the conveyances of the property made by the locators. These deeds showed that Belcher, after having conveyed fifty feet to Gregory, made a further conveyance of fifty feet to Rickelton, in which he recited the fact that the ground conveyed embraced his entire interest in the Sides claim. A similar recital is contained in the deed of Sides to A. E. Head for one hundred feet. The objection is to the effect that neither these recitals nor any deeds, save those made by plaintiff or Sides, could have affected plaintiff's interest, and should not, therefore, have been considered by the jury. These deeds were not offered in evidence for the purpose of estopping the plaintiff in the assertion of his claim, but for the purpose of establishing defendant's theory of the compromise and the interests taken by each of the locators under it. With this character of evidence defendant proved that each of the locators conveyed one hundred feet and no more of the Sides ground. This certainly was competent evidence of the extent of the ownership of the several locators, and tended to disprove plaintiff's theory that they severally owned one hundred and twenty-five feet.

In this view the attention of the jury was properly directed in the quoted instruction to the calls and descriptions, and not to the recitals in the deeds. These recitals were, however, admissible for the purpose of rebutting the testimony of Sides and Belcher, each of whom had sworn that the original interests of the location was one hundred and twenty-five feet, and not one hundred feet, as claimed by defendant; and, although no estoppel was claimed, the recital in Sides' deed was conclusive against plaintiff's claim to the twenty-five feet obtained through him.

The third exception consists in the admission in evidence of one of the books of the Sides company. The Sides com-

pany was an unincorporated association, composed of the owners of the claim, and organized for the purpose of providing means for its development. It had officers, kept a record of its meetings, and a book called the assessment book. This book has not been made a part of the record, but is said by counsel to have contained "a list of all the owners of the Sides claim, with each of whom was kept, upon a separate page, an account showing the amount per foot of each assessment levied, the number of feet assessed to such owner, the total amount of the assessments, and the payments made by him." It was shown that the persons claiming to be the owners of the Sides ground paid their respective assessments under this system. That there never was any controversy concerning the proportionate amount which each member of the association was required to pay, and that assessments were collected on five hundred feet, the full number of feet in the claim. That plaintiff and those to whom he had conveyed, paid on one hundred feet and no more; that those deriving title from Sides paid on one hundred feet, and no more, and that Belcher and Baldwin, and those representing each of their interests, paid on a like number of feet, and that Gregory and Winters and their grantees did the same. In this manner the claim was worked for two years, and between forty thousand dollars and sixty thousand dollars expended without a suggestion of any inaccuracy or error in the assessment book.

It was also proven that this book was at all times open to the inspection of the members of the company at its office. In submitting the book to the consideration of the jury they were instructed that if they believed plaintiff had actual knowledge of its contents they could then consider the entries mentioned as admissions of the extent of his ownership. The objection was directed to the point that plaintiff could not be bound by the entries, unless he had actual knowledge of them at the time. This objection is disposed of by the terms of the instructions.

The remaining objection arises upon instructions touching the application of the statute of limitations to the facts

of this case. In the year 1863 an incorporation was created under the laws of this state, called the Sides Silver Mining company. In the month of April of that year this incorporation entered into the exclusive possession of the Sides ground, claiming to be the owner of the entire claim under a deed from those who professed to own it, and continued such possession and claim openly and notoriously until some time in the month of May, 1868, when it conveyed the property to the defendant. This adverse possession of the Sides silver mining company, as well as that of its predecessors in interest, is pleaded in bar of plaintiff's recovery.

From the fact that both parties claim title from a common source, plaintiff contends that the evidence of ouster was insufficient to set the statute in motion, in this, that no notice of an intention to hold adversely was given him. In cases where the relation of tenancy in common exists, the exclusive possession of one tenant in common is not necessarily inconsistent with the continuance of this relation, and the commencement of an adverse possession must be unequivocally manifested. It is not necessary, however, in order to set the statute in motion in favor of one tenant in common against his co-tenant, that actual notice of an intention to hold adversely should be given. "To make a possession of tenant in common adverse as against the other," says Angell in his treatise on the limitation of actions, "it is not necessary that notice should be given of the adverse intent; but the intent must be manifested by outward acts of an unequivocal kind." (Sec. 429; *Humbert* v. *Trinity Church*, 24 Wend. 587; *Lodge* v. *Patterson*, 3 Watts, 74; *Owen* v. *Morton*, 24 Cal. 373; *Weisinger* v. *Murphy*, 2 Head (Tenn.), 674; *Culler* v. *Motzer*, 13 S. & R. 356; *Bradstreet* v. *Huntington*, 5 Pet. 440; 2 Greenl. on Ev., sec. 557.)

The uncontradicted testimony in this case, however, shows that the Sides corporation did not enter as tenant in common with the plaintiff, but as owner of the entire mining claim. It at no time acknowledged plaintiff's title, but held under an avowed claim to the whole, and especially in exclusion of him and those under whom he claims, claim-

ing the identical ground in controversy through conveyance from Winters and Gregory. Not claiming an undivided portion of the premises, nor admitting ownership in any wise in plaintiff or Sides, it can not be maintained that such possession was in support of the title claimed by plaintiff. Under the circumstances it was adverse from its inception. This principle was enforced under analogous facts by Judge Story in the case of *Prescott* v. *Nevers*, 4 Mason, 326. In that case the defendant claiming the whole estate entered under a deed purporting to convey all of it to him, although his title was good only to an undivided fourth interest in common with others. It was then said: "But he (defendant) made an actual entry into the whole, claiming the entirety, in fee and of right. His acts of ownership were such as amounted to a disseisin of the co-tenants; for he entered as sole owner; his possession was openly and notoriously adverse to them; and his acts went to a waste of the estate, and their utter disseisin. I take the principle of law to be clear, that where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seisin of the land co-extensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described, in any other person."

The doctrine is discussed in *Parker* v. *Proprietors etc.*, 3 Met. (Mass.) 100. In that case defendants acquired title through one Tyler, whose title was valid to an undivided portion of the estate only. The court said: "It does not appear that Tyler had notice or knowledge of the defect in his title. But whether he had such knowledge or not, it is very clear that he was in possession, claiming the entire title, and this undoubtedly was an adverse possession, which, being open and notorious, amounts to a disseisin. To constitute a disseisin, it is not necessary, at the present day, to prove the forcible expulsion of the owner, nor is it necessary for a tenant in common to prove an actual ouster of the co-tenant. If he enters, claiming the whole estate, the entry is adverse to the other tenants. The intention so

Points decided.

to hold the estate must be manifest, as it is in the present case, and the open and notorious possession of Tyler was constructive notice of a claim adverse to those heirs of Moors, who had not conveyed their title. If they had notice by the deeds to Hale, and by him to Tyler (which were duly recorded), they must have known that the latter never entered as tenant in common, but that he entered as purchaser of the entire estate."

The same principle was announced in *Bogardus* v. *Trinity Church*, 4 Paige Ch. 178, as is thus epitomized by the reporter: "Where one of several tenants in common conveys the entire premises held in common, and the grantee enters into possession under the conveyance, claiming title to the whole premises, such possession is adverse to the co-tenants of the grantor, and at the expiration of the period of limitation, their right will be barred. See also *Clymer's Lessee* v. *Dawkins*, 3 How. 674; *Jackson* v. *Smith*, 13 Johns. 407; *La Frombois* v. *Jackson*, 8 Cow. 589; *Kittredge* v. *Locks and Canals*, 17 Pick. 246.

The judgment and order are affirmed.

[No. 1,050.]

LONKEY & SMITH, RESPONDENTS, *v.* S. O. WELLS, APPELLANT.

MECHANIC'S LIEN—ITEMS OF ACCOUNT.—It is not essential to the validity of a mechanic's lien to specify the items of the account. It is sufficient to set forth a statement of the demand showing its nature and character and the amount due or owing thereon.

IDEM—STATEMENT OF TERMS.—If there are no special terms, time, or conditions given in the contract, none need be stated in the lien.

DEMURRER FOR NON-JOINDER OF PARTIES, ETC.—HOW WAIVED.—A party interposing a demurrer and relying upon any defect in the complaint as to non-joinder of parties, or uncertainty, must let final judgment be entered upon his demurrer. If he answers after his demurrer is overruled, he waives his right to rely upon his demurrer.

PRESUMPTIONS—WHERE RECORD DOES NOT CONTAIN ALL THE EVIDENCE.—Where the record on appeal does not purport to contain all of the evidence, this court will presume that there was evidence sufficient to sustain the conclusions and judgment of the court.

MECHANIC'S LIEN—WHEN MUST BE FILED.—A contractor must file his lien within sixty days after his contract is completed. Every other person entitled to a lien must file it within thirty days after the completion of the building.

IDEM—NOTICE TO LIEN CLAIMANTS.—The court proceeded to hear and determine the case without proof that notice had been given to other lien claimaints as provided by statute: *Held*, that, as there was no showing made that there were any other lien claimants, the defendant could not have been prejudiced, and is not entitled to a new trial.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

C. J. Lansing, for Appellant:

The plaintiffs had no lien upon the premises described in the complaint. The lien did not specify the items of account. (*Heston* v. *Martin*, 11 Cal. 41.) It did not contain a statement of the terms, time given, and conditions of the contract. The act requires this to be done. A failure to comply with this requirement invalidates the lien. (Phil. Mech. Liens, sec. 18; *Associates of Jersey* v. *Davidson*, 5 Dutch. 415; *Ayres* v. *Revere*, 1 Id. 474; *Parker* v. *Anthony*, 4 Gray, 289; *Greenough* v. *Nichols*, 30 Vt. 768; *Noll* v. *Swineford*, 6 Pa. St. 187; *Con. Pres. Soc.* v. *Staples*, 23 Conn. 544; *Bottomly* v. *Grace Church*, 2 Cal. 90; *Skyrme* v. *Occidental M. & M. Co.*, 8 Nev. 219; *Goss* v. *Strelitz*, 54 Cal. 640; *Hunter* v. *Truckee Lodge*, 14 Nev. 24; *Wood* v. *Wrede*, 46 Cal. 637.)

Lewis & Deal, for Respondents.

By the Court, HAWLEY, J.:

Section 5 of the "Act to secure liens to mechanics and others" (Stat. 1875, 122), reads as follows:

"Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, * * * file for record with the county recorder * * * a claim containing a statement of his demand,

after deducting all just credits and offsets, with the name of the owner * * * and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person."

1. It is claimed by appellant that the plaintiffs' pretended lien does not conform to the provisions of this section, and is, therefore, invalid.

The portion of the lien to which the objections are urged reads as follows:

"That it is our desire to avail ourselves of the benefits of the act, * * * and that it is our intention to claim a lien upon the premises aforesaid and hereinafter described, and to claim and to hold such lien, not only on said building or superstructure so erected, but also upon the land upon which the same is erected; * * * that G. K. Hollister is the person by whom we were employed to furnish the said materials for the construction of said building, and to whom, at his special instance and request, we did furnish said material, the said G. K. Hollister being engaged as contractor to construct said building for the said S. O. Wells, who was and is the owner thereof, and also the land and premises whereon the same is situated; that the following is a correct and true statement of our demand for which we claim said lien, viz., material, to wit: lumber, doors, sash, blinds, moldings, casings, and mill work, for said building, to the amount and value of five hundred and thirty-six dollars and twenty-seven cents, after deducting all offsets and credits, which said lumber and material was furnished by us to said G. K. Hollister, to be used, and was, in fact, used in the construction of the said building hereinafter described; that no part of said account has been paid, and the said sum of five hundred and thirty dollars and twenty-seven cents is now wholly due and unpaid; that the said lumber and material was commenced by us to be furnished upon the twenty-eighth day of October,

1879, for the construction of said building, and was continued to be furnished up to and including the fifteenth day of November, 1879, and was wholly furnished within those two dates, and that thirty days have not elapsed since the completion of said building or superstructure, for which said material was furnished."

Then follows a true description of the building and premises to be charged with the lien, and it is verified in proper form. The specific objections to this lien are, first, that the instrument is "but a notice of intention to claim a lien." This objection is frivolous. Second, "the lien or claim of lien is bad and insufficient, inasmuch as it fails to show an account or set forth the items of materials in the statement of demand in claim of lien filed, or specify the quantity of lumber and materials, or the kind of materials furnished, or the price or value of each or any kind, or the balance of the * * * account, or that the contract for the sale of the lumber and materials was in gross." The supreme court of California, under a statute, in this respect, identical with our own, has frequently decided that it is not absolutely essential that the lien should specify the items of the account; that the statute only required "a statement of the demand, showing its nature and character, and the amount due or owing thereon." (*Brennan* v. *Swasey*, 16 Cal. 142; *Selden* v. *Meeks*, 17 Id. 131.)

The statement in plaintiffs' lien is not as clear and specific as it might have been made, but tested by the decisions above referred to and the previous decisions of this court, it is not so defective "as to prevent the enforcement of the lien." (*Skyrme* v. *Occidental M. and M. Co.*, 8 Nev. 237.)

The third objection is that "the lien or claim is invalid because it fails to contain a statement of the terms, time given, and conditions of the plaintiffs' contract." It is undoubtedly the true meaning of the statute, as stated by McKinstry, J., in *Goss* v. *Strelitz*, 54 Cal. 643, "that the rights of sub-contractors and material-men should be ascertained by reference to the *liens as filed*, or should rest upon proof of contracts between them and the original contractor such as accord with the terms and conditions set forth in the

claims of lien." But if there are no special terms, time, or conditions given none can be stated, and in the absence of any such specification, or proofs to the contrary, the law would presume that none existed, and that the materials were to be paid for on delivery. The several objections to the validity of the lien are untenable.

2. It follows from the views already expressed that the complaint states facts sufficient to constitute a cause of action, and that the demurrer interposed upon that ground was properly overruled.

3. The questions whether the court erred in overruling defendant's demurrer upon the ground of non-joinder of parties defendants, or of ambiguity and uncertainty as to the time when the building was completed, can not be considered upon this appeal, for the reason that the defendant did not rest upon his demurrer and allow judgment to be entered against him thereon. After his demurrer was overruled he filed an answer raising issues of fact, and thereby waived his right to rely upon his demurrer upon issues of law. The general rule seems to be well settled, as stated by Bliss in his work on code pleading, that "if the demurrant wishes to take advantage of any supposed error in overruling the demurrer, he must let final judgment be entered upon it; for, if he shall answer, after such ruling, he waives any objection to it, except for the two radical defects. (Sec. 417.) (*De Boom* v. *Priestly*, 1 Cal. 206; *Pierce* v. *Minturn*, Id. 470; *Brooks* v. *Minturn*, Id. 481; *Pickering* v. *Mississippi V. N. T. Co.*, 47 Mo. 459, 460; *Township Board of Education* v. *Hackman*, 48 Id. 246; *Saline Co.* v. *Sappington*, 68 Id. 457; *Mitchell* v. *MaCabe*, 10 Ohio, 409; *Peck* v. *Cowing*, 1 Denio, 222; *Jones* v. *Thompson*, 6 Hill, 621; *Irvine* v. *Forbes*, 11 Barb. 589; *Fisher* v. *Scholte*, 30 Iowa, 222; *Coit* v. *Waples*, 1 Minn. 140; *Hill* v. *Wright*, 23 Ark. 530.)

4. The question whether the evidence is sufficient to show that the lien was filed within thirty days after the completion of the building must be considered as settled by the findings of the court to that effect, because the record does not purport to contain all the evidence. But it is argued that the additional findings show the facts upon which the

court acted, and conclusively show that the lien was not filed within the statutory time.

The additional findings, upon which appellant relies, read as follows:

"1. That the said building of defendant, S. O. Wells, was wholly completed and finished on the seventeenth day of December, A. D. 1879, except that some picture moldings were thereafter placed and put up on the walls of said building.

"2. That said picture moldings were furnished by the defendant, and were put up by said Hollister, or a man in his employ, who did not complete the putting up thereof until the twenty-second of December, A. D. 1879.

"3. That the contract between said Hollister and defendant provided that said Hollister should build said house and furnish all the materials at his own expense, but did not provide for the putting up nor furnishing of any picture moldings. * * *

"4. That said picture moldings consist of a narrow strip of lumber about one and three quarters inches in width and one half inch thick, and so made as to receive hooks upon which pictures may be hung, and are fastened to the upper part of the walls with nails."

We do not think these findings are in opposition to the finding of the court that the lien was filed "within thirty days after the completion of said building." The facts that the original contract did not call for the picture moldings and that the original contract between Hollister and Wells was completed more than thirty days prior to the filing of the lien are immaterial. Notwithstanding these admitted facts, the plaintiffs may have been entitled to their lien. The law requires every contractor to file his lien within sixty days *after the completion of his contract.* But every other person entitled to a lien is required to file a lien within thirty days *after the completion of the building.* The real question, therefore, was: When was the building completed? If the building was not completed until the picture moldings were put up, then the plaintiff's lien was filed within the statutory time. That fact was within the prov-

ince of the court to determine, and inasmuch as the record does not contain all the evidence, we must presume it was sufficient to sustain the conclusions and judgment of the court.

5. This brings us to a consideration of the last question presented by this appeal. Did the court err in hearing and deciding this case without proof that notice had been given to other lien claimants, as provided in section 15? If there had been any showing that there were other lien claimants, we think it would have been the duty of the court to have compelled the plaintiffs to give the notice required by law before proceeding to hear the case. The law contemplates that all the lien claimants shall be brought in, and their rights, as well as those of the plaintiffs and defendant, shall be heard and determined in one action. (*Elliott* v. *Ivers*, 6 Nev. 290.) But in the present case there is no showing that there were any other liens, and we must presume there were none. If so, the defendant could not have been prejudiced and is not entitled to a new trial.

The judgment of the district court is affirmed.

[No. 1,041.]

A. J. BUNTING AND M. HARRISON, RESPONDENTS, *v.* THE CENTRAL PACIFIC RAILROAD COMPANY, APPELLANT.

NEGLIGENCE OF RAILROAD COMPANY—NEGATIVE AND POSITIVE TESTIMONY—CONFLICT OF EVIDENCE.—Upon the question whether defendant rung its bell or blew its whistle there were several witnesses, upon the part of plaintiffs, who testified that they were in a position where they could have heard the signals had they been given, and that the signals were not given: *Held*, that this negative testimony raised a conflict of evidence against the affirmative testimony of defendant's witnesses, that the bell was rung and the whistle blown.

CONTRIBUTORY NEGLIGENCE — INSTRUCTION. — The court instructed the jury that if they believed from the evidence "that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same, and to the passengers and railroad employees on same in his then situation, and could prudently have avoided

Argument for Appellant.

collision with his team, his failure so to stop amounts to negligence, and renders the defendant liable for damages, and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence:" *Held*, that, although this instruction is carelessly drawn, the principle of law embodied therein is not erroneous. (BELKNAP, J., dissenting.)

IDEM—APPLICABILITY OF INSTRUCTION—JURY NOT MISLED.—Upon a review of the testimony and of the several instructions given by the court upon the question of negligence: *Held*, that there was some evidence to which the instruction might apply, and that the jury could not have been misled, by the giving of this instruction, to the prejudice of the defendant, as to the law of the case. (BELKNAP, J., dissenting.)

CONFLICT OF EVIDENCE — WHETHER PLAINTIFFS COULD HAVE SEEN THE TRAIN—Upon a review of the testimony, in response to petition for rehearing: *Held*, that there was a conflict of testimony as to whether the plaintiffs might have seen the train of the defendant had they looked, and might have heard the train of the defendant had they listened.

IDEM—REASONABLE CARE.—The question for the jury and court to decide was not "whether the plaintiffs might have seen the train of the defendant had they looked" at some particular point, but whether, under all the facts and circumstances testified to in this case, they made reasonable efforts to see and hear the approaching train, and, in this respect, exercised the due care and caution which the law requires.

REASONABLE CARE—DUTY OF RAILROAD COMPANY TO STOP ITS TRAIN IN CASE OF GREAT PERIL.—Railroad companies, as well as travelers, must exercise reasonable care and caution, and in the present case, although the plaintiffs may not have been entirely free from fault, if the engineer of defendant's train saw the plaintiffs' team, as it was coming upon the track, in a position of great peril and danger, and he could, by the exercise of reasonable care, have lessened the speed of his train, or stopped it, with safety, in time to have avoided the collision, it was his duty to do so.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion

W. H. L. Barnes, for Appellant:

I. The evidence is insufficient to justify the verdicts in these cases; because the whole evidence shows that the appellant was guilty of no negligence, and that the respondents were. (Testimony reviewed at length.)

II. The whole case showed that the plaintiffs were guilty of contributory negligence; and demonstrated that they could have seen and heard the train by the ordinary exer-

cise of the faculties of seeing and hearing; and could have known of the approach of the train in sufficient time to clearly avoid any injury from it. (Testimony reviewed.)

III. The first instruction given by the court to the jury at the request of the plaintiffs was erroneous. It was wholly unjustified by the evidence. No instruction should ever be given unless there is some evidence before the jury to which it is applicable upon some rational theory of the case logically deducible from such evidence. The instruction was upon an abstract proposition not before the jury, and was calculated to mislead them. For this error a new trial should be granted. (*Slaughter* v. *Fowler*, 44 Cal. 195; *Mendelsohn* v. *Anaheim L. Co.*, 40 Id. 657.) But if it can be said that the instruction was possibly pertinent, it was contradictory to and inconsistent with instruction No. 4, given by the court of its own motion, and for this reason a new trial should be granted. (*Brown* v. *McAllister*, 39 Cal. 577; *McCreery* v. *Everding*, 44 Id. 251.)

Upon petition for rehearing the following authorities were cited: *Railroad Co.* v. *Houston*, 95 U. S. 697; *Harper* v. *Erie Railroad Co.*, 32 N. J. L. 88; *Chicago & N. R. R. Co.* v. *Demick*, 96 Ill. 42; *Schofield* v. *Chicago & M. & S. P. R. R. Co.*, The Reporter, November 2, 1881; *Gothard* v. *Alabama S. R. R. Co.*, The Reporter, July 20, 1881.

Thomas E. Haydon, for Respondents:

I. There is abundant evidence that no signals by bell or whistle or otherwise were given. This is proven by plaintiffs and numerous witnesses, that they did not hear them. Defendant's witnesses testified that they did hear them. That makes a case of conflict of evidence. (1 Thomp. on Neg. 432:)

II. There is not any absolute or irreconcilable repugnancy between the instructions. The first instruction is law. (Whart. on Neg., sec. 388.)

By the Court, HAWLEY, J.:

This is the second appeal taken in these cases. The first was an appeal by plaintiffs from a judgment of nonsuit (14

Nev. 351.) The second is taken by defendant from a judgment in favor of plaintiffs and from an order of the district court refusing to grant a new trial. It was correctly assumed in the argument, by appellant's counsel, that the law of these cases is settled by the previous decision, and that of *Cohen* v. *The Eureka and Palisade Railroad Company*, 14 Nev. 370. It was also properly admitted that "the testimony offered on behalf of the plaintiffs upon the second trial was substantially identical with that offered upon the first."

Appellant, upon this appeal, admits that in the light of the former decision, the plaintiffs' testimony made out a *prima facie* case against the defendant; but it is claimed that, upon the whole case, the evidence is so overwhelmingly in favor of the defendant that the verdict in favor of plaintiffs ought to be set aside. The rule, so often declared by this and other courts, that an appellate court will not set aside a verdict upon the ground of the insufficiency of the evidence, or review the weight of testimony where there is a substantial conflict of evidence, was recognized throughout the entire argument. In this connection it was with great energy, and an ingenious selection of portions of the testimony of several witnesses, sought to be shown that the testimony submitted on the part of the plaintiffs was so slight, negative, and indefinite, and the testimony on behalf of the defendant so strong, positive, and clear, that it ought not to be said that there is any conflict in the evidence.

In view of this argument we have carefully read and considered all of the testimony submitted by the respective parties, and our conclusion is that upon all the material questions there is a substantial conflict in the evidence. In determining the question whether the bell was rung or the whistle blown we agree with the appellant, that a mere "I did not hear it" is entitled to but little, if any, weight in the presence of affirmative evidence that these signals were given. But that is not, in our opinion, a fair statement of the facts of this case. The evidence amounts to more than a mere "I did not hear it." Several of the witnesses upon the part of the plaintiffs were in a position where they could and

ought to have heard the signals had they been given. Some of them were looking and listening for the train, and state positively that they could have heard the usual signals if they had been given. Both of the plaintiffs swear positively that the signals were not given. Quinn was positive that no bell was rung or whistle sounded. McClelland was positive that the bell was not ringing. Buncell, Holliday, Brown, and others testified that they could have heard the bell, if it had been ringing, and that they did not hear it. This, in our opinion, raises a conflict of evidence against the affirmative testimony of defendant's witnesses.

The question whether negative testimony can, in any case, have the force and effect of positive testimony was considered by this court in *Cohen* v. *Eureka and Palisade Railroad Company*, 14 Nev. 386, and it was there declared that where the witnesses were in a position to hear, their testimony that the bell was not rung "was just as positive as such testimony can ever be."

In *Benwick* v. *New York C. R. R. Co.*, 36 N. Y. 132, the court, in passing upon this question, said: "As some of the plaintiffs' witnesses were in a condition to hear it (the bell) if it had been rung, and were giving their attention to the train, the fact that they did not hear it is evidence conducing to prove that it was not rung. * * * The conflict raises a question of fact, which the plaintiff had the right to have determined by the jury." To the same effect see *Byrne* v. *New York C. & H. R. R. Co.*, 14 Hun, 322; *Dublin W. W. & R. R. Co.* v. *Slattery*, 3 Appeal Cases (L. R.), 1155. In the case last cited there were ten witnesses who testified that the whistling occurred at the proper time and in the usual way, and only three witnesses testified that, being in a position in which, if it so occurred, the sound should have reached their ears, they did not hear it. Lord O'Hagan, in giving his views upon this state of facts, said: "It is impossible not to be struck by the apparent weight of the defendant's proof. But, as was observed in the Irish court of common pleas, the jury saw the witnesses, and the judge did not condemn the verdict. And whether it was right or wrong, the jurors alone were competent, legally and

constitutionally, to decide between the ten who testified on the one side and the three who testified on the other. It was urged, and the authority of an eminent judge was vouched to sustain the suggestion, that proof of the want of hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me manifestly legal evidence, which may vary in its value and persuasiveness, which may in some instances be of small account, and in others be the strongest and the only evidence possible to be offered; but at all events can not be withheld from the jury; and if this be so, *there was here a conflict of testimony* on which the jurymen, and they alone, were competent to pronounce."

In *Kansas Pacific Railroad Co.* v. *Richardson,* which in many respects was similar to the case in hand, Horton, J., in delivering the opinion of the court, said: "Though most of this evidence on the part of the plaintiff below was of a negative character, and the company gave positive evidence of a greater number of witnesses to contradict and overcome it, still there was a sufficient conflict of evidence to raise a question of fact, which the trial court was justified in submitting to the jury. The evidence against the giving of the signals was more, when carefully considered, than a mere 'I did not hear.' Some of these witnesses had their attention directed to the train as it came in; they were looking at the train, and were in a position to give heed to the presence or absence of the signals. The evidence conduced to prove that the signals were not properly and timely given; at least it was some evidence in that direction. The failure to give signals must be proved by witnesses that they did not hear them. When others testify that they gave them and others testify that they did not hear them, there is evidence on both sides to be considered. The evidence before the court being sufficient to be submitted to the jury, and to be considered by them, it was sufficient to sustain a finding that proper signals of warning of the approach of

the train to the crossing were not given." (The Reporter, vol. XII., No. 16, 493.) We are of opinion that the vital question whether plaintiffs were guilty of contributory negligence, whether they exercised ordinary care and caution, was properly left to the jury for decision, and that, inasmuch as there is a substantial conflict in the testimony offered by the respective parties, the verdict of the jury ought not to be disturbed upon the ground of the insufficiency of the evidence.

It is next argued that the court erred in giving the first instruction asked by plaintiffs. This instruction reads as follows: "The jury are instructed that it is as much the duty of a railroad engineer to exercise prudence and caution in running his train, so as to avoid injury to persons crossing a track, as it is the duty of such persons to avoid contact with the train. Therefore, if they believe from the evidence that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same, and to the passengers and railroad employees on same in his then situation, and could prudently have avoided collision with the team, his failure so to stop amounts to negligence, and renders the defendant liable for damages, and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence." The first portion of this instruction is not objected to. The latter portion is carelessly drawn, and it is not as clear as it might have been made; but the principle of law embodied therein is not erroneous.

The questions ordinarily applicable to cases like this are, first, whether the damages were occasioned entirely by the negligence of the defendant, or second, whether the plaintiffs so far contributed to the injury by their negligence or want of ordinary care and reasonable diligence, that, but for such negligence or want of ordinary care and caution on their part, the accident would not have happened. In the first place, if the question was answered in the affirmative, the plaintiffs would be entitled to recover, in the second they would not; as but for their own fault the accident

would not have happened. But it does not necessarily follow that the damages must have been occasioned solely by the negligence of the defendant, for if the plaintiffs were in a remote degree negligent, but their negligence was not the proximate cause of the injury, and they exercised ordinary care to avoid the injury, they would still be entitled to recover; and although the plaintiffs may not have been entirely free from fault, they would, nevertheless, be entitled to recover if the defendant, in the exercise of ordinary care and caution, could have prevented the injury.

This last qualification is applied in a great variety of cases, the most frequent of which, as found in the books, is where cattle are injured upon the track of a railroad and where the engineer of the train could, after seeing them, by the use of ordinary care upon his part, have avoided the injury; but it is proper to be given in all cases where there is any testimony tending to show that the defendant was guilty of gross or willful negligence.

The views we have expressed upon this point are sustained by abundant authority. (*Butterfield* v. *Forrester*, 11 East, 60; *Bridge* v. *The Grand Junction R. R. Co.*, 3 M. & W. (Exch.), 244; *Davies* v. *Mann*, 10 M. & W. (Exch.), 545; *Tuff* v. *Warman*, 94 Eng. Com. Law, 584; *Bradley* v. *London & N. W. R. R. Co.*, 1 Law Rep. (appeal cases), 759; *Solen* v. *& V. T. R. R. Co.*, 13 Nev. 106; *Kansas Pacific R. R. Co.* v. *Pointer*, 14 Kan. 37; *Morrison* v. *The Wiggins Ferry Company*, 43 Mo. 383; *Brown* v. *The Hannibal & St. Joseph R. R. Co.*, 50 Mo. 465; *Kerwhaker* v. *Cleveland, C. & C. R. R. Co.*, 3 Ohio St. 172; *Northern Central R. R. Co.* v. *Price*, 29 Md. 437; *Baltimore & Ohio R. R. Co.* v. *Dougherty*, 36 Md. 368; Wharton on Negligence, sec. 388; Shearman & Redfield on Negligence, secs. 36, 493.) .

The important question, presented by the testimony, was whether the plaintiffs exercised ordinary care and caution, and the principal objection, urged by appellant's counsel, to the instruction is, that it was not applicable to any evidence in the case. We are, however, of the opinion that there was some evidence that justified the giving of a proper instruction upon this point. There was testimony offered

by both parties as to the distance within which the train might have been safely stopped. Kemp, a witness for plaintiffs, testified that a train running at the rate of twenty miles an hour could be safely stopped, by the use of air brakes, in one hundred and twenty-five yards; that if the train was stopped in two hundred and twenty-five feet it would indicate a speed of about twelve miles an hour. The testimony upon the part of the defendant tended to show that the train was stopped within a distance of about two hundred and fifty feet.

It is true that this testimony was offered for the purpose of showing the rate of speed at which the train was moving. But it is not improper to consider it with reference to another branch of the case. The defendant, for the purpose of showing that plaintiffs did not exercise ordinary care, introduced several witnesses whose testimony tended to show that the obstructions upon and along the north side track did not prevent the plaintiffs from seeing defendants' train at distances varying, as they approached the main track, from one hundred to five hundred feet, in ample time, after arriving at the north side track, to have stopped their team if they had been looking in that direction, and thereby have avoided the injury.

This testimony, like the edges of a sword, cuts both ways. While it tended to prove a want of care upon the part of plaintiffs, it also tended in another direction to prove gross negligence on the part of the defendant. There was a decided conflict of evidence upon this point. If the jury believed the testimony upon the part of the defendant, it would have been their duty to determine whether the engineer of the train, had he been keeping a reasonable lookout, as it was his duty to do, could not have seen the horses attached to plaintiff's wagon before, or at least as soon as, the plaintiffs could have seen the train; and in view of this testimony it was, perhaps, proper for plaintiffs to ask the court to submit to the jury the question whether the defendants' engineer could not, by the exercise of ordinary care and caution, after discovering plaintiff's team, have lessened the speed

or stopped the train, with safety, in time to have avoided the collision.

We are free to confess that we do not think it was necessary to introduce this element of gross or willful negligence into the case; but we are unwilling to say that there was no evidence to which the instruction might apply. The fact is that the testimony of the defendant's engineer, evidently offered for the purpose of showing that he was not at fault, as might be inferred from the testimony of other witnesses, tended to support the plaintiffs' theory that the obstructions on and along the north side of the track prevented them from seeing the train in time to avoid the collision. This engineer testified that he was sitting in his usual place looking ahead and that he did not see the horses until the locomotive was right on to them, and that it was impossible for him to have checked the speed of the train, or stopped it in time to prevent the collision.

But even if we should concede that the instruction was to some extent inapplicable to the facts, it would not necessarily follow that the judgment should be reversed; certainly not, if it is apparent from a consideration of all the instructions that the jury could not have been misled thereby.

It is argued by appellants' counsel that the instruction is contradictory to and inconsistent with instruction number four, given by the court of its own motion, as follows:

"If you should believe from the evidence that the defendant was guilty of culpable negligence in running its train of cars into Reno on the morning of the twelfth of June, A. D. 1877, nevertheless, the plaintiffs can not recover, if they could have avoided the injury by the exercise of ordinary care."

If these were the only instructions given, the objection would have more force. But from an inspection of the record it clearly appears that instruction number four was given upon the theory that if plaintiffs' negligence was the proximate cause of the injury they could not recover, and that the jurors, as reasonable men, must have so understood it, and that the instruction given at the request of plaintiffs

introduced another and different element for their consideration.

In *Radley* v. *London & N. W. R. R. Co.*, *supra*, Lord Penzance said that the law in these cases of negligence was well settled. "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence can not succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely: that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

In *Brown* v. *The Hannibal & St. Joseph Railroad Co.*, *supra*, the lower court instructed the jury as follows: "Even if the jury should believe from the evidence that the plaintiff was guilty of negligence or carelessness which contributed to the injury, yet if they further believe from the evidence that the agents or servants of defendant, managing the locomotives or machinery of the defendant with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for plaintiff."

The supreme court said that this instruction was "entirely unobjectionable." In that case, as well as in this, it was argued that the negligence on the part of the plaintiff was "unaccountable and inexcusable," and that her carelessness was entirely inconsistent with the right to recover damages "founded on the negligence of the defendant."

The rule is well settled that all the instructions must be considered together, in order to determine whether or not the jury may have been misled In the present case the jury were repeatedly told, in the instructions of the court, that if they believed, from the evidence, that the plaintiffs did not exercise ordinary care and diligence, or that their

negligence was the proximate cause of the injury, they were not entitled to recover, although the defendant was negligent, in not ringing its bell or blowing its whistle, or running its train at an unusually fast rate of speed. This principle was presented in every imaginable form, at great length, as strongly in favor of the defendant as the law would warrant.

We quote but one instruction, in addition to number 4, among the many that were given, to illustrate the general principle announced by the court:

"Even though the jury may find that the defendant corporation did not on the occasion of the accident in all respects, or in any respect, fulfill any obligation it was under of giving usual and ordinary signals of its approach, so as to warn passers of the approach of its train, yet that circumstance, or those circumstances, does not and do not shield the plaintiffs from the exercise of ordinary care and prudence on their part. The fact, if the jury shall so find it, that the train of the defendant corporation approached the crossing of Sierra street without blowing any whistle, where the whistle had usually been blown theretofore, and without ringing any bell, does not of itself authorize the plaintiffs to recover damages, if the plaintiffs, notwithstanding the negligence of the railroad company, recklessly exposed themselves to danger; and if it appears to the jury that the injury complained of would not have occurred but for their own misconduct or negligence, they can not recover damages, but must bear the consequences of their own folly."

All that was said by the court, as to the right of the plaintiffs to recover, is embraced in the following instruction: "If you shall be of the opinion, after a full, fair, candid, and unprejudiced review of all the testimony given on behalf of the respective parties, that on the day and year, and at the place alleged in the complaint, the plaintiffs, while exercising that due care which a reasonably prudent man under the circumstances of the case would exercise, were injured and their property destroyed by being run into by the train of the defendant, and that the

collision was wholly caused by the neglect and carelessness of the defendant corporation, or that after discovering the plaintiffs upon the track, the defendant could have avoided the collision by the exercise of proper care, then the plaintiffs are entitled to a verdict, *and not otherwise.*"

We think it is manifest that the instructions given by the court, as well as some portions of the evidence, authorized the plaintiffs to ask and the court to give the instructions complained of, and that in any event, it is apparent from a careful consideration of all the instructions given, that the jury could not have been misled, to the prejudice of the defendant, as to the law of the case.

The judgment of the district court, in each case, is affirmed.

By BELKNAP, J., dissenting:

The first instruction, which is fully set forth in the opinion of the court, charged the jury that if the engineer of the colliding train could, with safety to the passengers and property in his charge, have stopped his train and thereby "have avoided collision with the team, his failure so to stop amounts to negligence and rendered the defendant liable, * * * and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence."

It is a general principle of the law of negligence that a plaintiff can not recover damages for injuries to which himself has contributed. In order, however, to bar a recovery the negligence of the plaintiff must be the proximate cause of the injury; it must be negligence occurring at the time the injury happened. If the defendant, after becoming aware of plaintiffs' danger, could have avoided the injury by the exercise of ordinary care, an action may be sustained, notwithstanding plaintiff may have been remotely negligent in exposing himself to such danger.

It was therefore held in the case of *Davies* v. *Mann*, 10 M. & W. 547, the leading case upon the subject of negligence in a plaintiff which will not disentitle him to recover, that the plaintiff could recover notwithstanding he had

negligently left his donkey to graze upon the highway with its forefeet so fettered as to be unable to get out of the way of passing wagons, and while so situated was killed by the negligent act of defendant in driving his horse and wagon against it. The court based its decision upon the ground that the mere fact of that negligence on the part of the plaintiff in leaving his donkey upon the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; but that, if the immediate cause of the injury was the negligent and too rapid driving of defendant's servant, plaintiff could recover. "For, although the ass may have been unlawfully there," said the court, "still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

This subject was considered and the doctrine well stated in *B. & O. R. R. Co.* v. *Trainor*, 33 Md. 542, a case in which plaintiff's intestate was killed in walking upon a railroad track. Said the court: "It is argued that if the deceased walked on the track, and his walking on the track was want of ordinary care, and the accident would not have happened if he had not walked on the track, then such walking was the proximate cause of the accident, and the plaintiff can not recover. * * * By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. No man would ever have been killed on a railway, if he had never gone on or near the track. But if a man does, imprudently and incautiously, go on a railroad track, and is killed or injured by a train of cars, the company is responsible, unless it has used reasonable care and caution to avoid it, provided the circumstances were not such, when the party went on the track, as to threaten direct injury, and provided that

being on the track he did nothing, positive or negative, to contribute to the immediate injury."

It has accordingly been held that if the owner of cattle suffer them to range at large, and they stray upon a railway track and are run over by passing cars, such owners may recover damages if the injury could have been avoided by the exercise of ordinary care upon the part of the railroad engineer. In the class to which cases of this nature belong (and many of them are cited in the opinion of the court) it will be observed that the plaintiff has been guilty of some degree of negligence touching his person or property, but such negligence was the remote and not the proximate cause of the injury. In such cases it is well settled that a recovery may be had. An examination of the facts of this case, however, has convinced me that the general doctrine under consideration (and which I can not admit was correctly expressed in the instruction) was inapplicable and misleading.

Here are the facts: Upon the morning of the accident the plaintiffs were driving two horses before an open wagon in a southerly direction along Sierra street, a public street in the town of Reno, crossed at right angles by defendant's railroad track. In attempting to cross the track the wagon was struck by a train of cars approaching from the west, and plaintiffs injured in their persons and property, as complained of. Plaintiffs' theory was that as they approached the crossing their view of the main track and of the colliding train moving upon it was obstructed, not only by buildings along the west line of Sierra street, but by passenger and box cars upon a side track, and quantities of wood unloaded from defendant's cars. They show that the train approached the crossing where the collision took place upon a descending grade, at a high rate of speed, and claimed that it gave no warning by bell or whistle of its approach.

From these facts I conclude that no question of remote negligence was or could have been presented. If plaintiffs were negligent at all, such negligence arose from their failure to listen for signals of the approaching train, or to have seen the approach of the train, if that were possible, in

time to have avoided the collision. But if they neglected to exercise ordinary caution and were negligent, their negligence occurred at the time of the accident. Such negligence, if it existed, was the proximate cause of the injury, and would defeat a recovery under all of the authorities. And it is equally well settled that, if the negligence was mutual, and the negligence of each party was the proximate cause of the injury, no action can be sustained.

In justification of the instruction it is said that some testimony was introduced by defendant tending to show that plaintiffs could have seen the approaching train in time to have avoided the collision, and, that, if this were so, such testimony at the same time proved that the engineer could have seen the plaintiffs and avoided the accident. If it be conceded that the engineer could have seen plaintiffs in time to have avoided the accident, it must be admitted that plaintiffs could have seen the approach of the train. If they did not see it when they could have seen it, or seeing it assumed the hazard of crossing, they were alike guilty of contributory negligence. Nor was the error in this portion of the charge nullified by the giving of other instructions upon the subject of contributory negligence favorable to appellant. It was as much the duty of the jury to obey the instruction that was incorrect as it was their duty to obey the correct instructions. As the instructions were irreconcilably conflicting, the jury may have been misled.

For these reasons I think the judgment and order of the district court should be reversed.

RESPONSE TO PETITION FOR REHEARING.

By the Court, HAWLEY, J.:

In my opinion the decision heretofore rendered is sufficiently explicit upon all the points discussed in the petition for rehearing; but there are two questions presented which we will answer.

1. "Was there a substantial conflict in the testimony offered by the respective parties upon the question as to whether the plaintiffs might have seen the train of the de-

fendant had they looked, and might they have heard the train of the defendant had they listened?"

We think, and it is so announced in the opinion of the court, that there is a decided conflict of evidence upon this point. It is true that we only discussed the question of conflict of evidence as to whether "the bell was rung and a whistle sounded;" because, in our opinion, there was less conflicting testimony upon that point than upon the one we are now asked to review. But we did examine all the evidence carefully, and considered all the questions raised by appellant, and stated, in direct terms, our conclusion to be "that upon all the material questions there is a substantial conflict of evidence."

The plaintiffs testified that as they approached the crossing they both looked and listened in order to ascertain whether a train was approaching; that they did not hear any bell rung or whistle sounded; that they were prevented from seeing the train by "the cars on the upper side of the track" and the woodpiles; that a train of cars was on the side track below the crossing; that as they approached the north side track the engine of the lower train "was blowing off steam;" that the near horse became frightened at this noise and his shying drew the team to the upper edge of the track. Bunting says that upon coming upon the north side track he "heard a low rumbling sound;" that he thought it was the lower train starting, and he looked down and saw that train standing still, and as he looked up he saw the approaching train too near for him to either stop his team or to cross the main track in time to avoid the collision. To quote from the record: "When I looked down I noticed the train still standing, and just at that time, at that second, Mr. Harrison grabbed the lines and exclaimed: 'My God, we are killed!' and I looked up and saw the approaching train.

"Q.—What did you do then? A.—As soon as I saw it I had no time to pull the horses up, they got so far that I couldn't get them off the main track. I pulled them around and hit the off horse once or twice—twice, I think.

"Q.—Pulled them around east? A.—Yes, sir.

"Q.—What was your idea in pulling them around that way? A.—To save my team and myself. I thought that I could get off the track, but my wagon wouldn't turn short enough.

"Q.—You did try to turn them off the track? A.—Yes, sir. I saw that I had no time to get over the track, and I tried to pull them round.

"Q.—State to the jury what would have been the result had you, instead of pulling them around as you did, have attempted to have gone straight over the track? A.—I don't think I had time to get over the track.

"Q.—Did you have time? A.—No, sir.

"Q.—Suppose you had gone on, instead of pulling them around as you did, what would have been the result * *? A.—I think the locomotive would have got me somewhere in the middle of the wagon—probable in the back end—if I had rushed my team over, loaded as I was with eighteen hundred pounds on the wagon.

"Q.—When you first noticed that train * * * could you have backed your horses and have got to the north of the train? A.—No, sir."

The testimony of the witnesses Wheeler, Buncell, McClelland, McFarland, Bates, and Faloon tended to corroborate plaintiffs' statement.

Wheeler testified that he walked from McFarland's shop to the track; "that the cars and wood obstructed a view of the main track up to the center of the second block above; in fact, you couldn't see Bragg's lumber yard," a half a mile above the crossing.

Buncell, in reply to the question, what "obstructions there were to sight or hearing" between "the north side track and McFarland's," said, "There were box cars clean up to Jamison's corner and on the other side of the crossing, * * * and then there was lumber and cordwood * * * thrown in piles, * * * some as high as the top of the doors of the box cars. * * * I saw the smokestack; that is all I could see until it struck the team. * * * I don't think they (plaintiffs) had as good a show to see it as I had from the distance I was off. * * *

I don't think they had any show of hearing the train; * * * there was no show for them to see the train, as Bunting was lower than the cars, * * * don't see how he could see the train."

McClelland, in answer to the question, "And then the obstruction caused by the train of cars on the side track, and the woodpile and lumber, etc.; taking into consideration all of these circumstances, would it be anything remarkable if Bunting couldn't hear the train approach?" said, "Under these circumstances, I think not."

Bates testified that he "drove across the track a very few minutes after Mr. Bunting, and there was a freight train backing down. I drove across the crossing before I saw it. I was very close. My off horse saw it before I did and he jumped across the track, and the train was very close to me when I got across."

"Q.—In passing over this point could you see anything of this train? A.—I didn't see it. The horses saw it and jumped as I passed by the cars.

"Q.—Did you see anything? A.—No, sir.

"Q.—Did you habitually look and listen for the train? A.—Always."

Faloon, who was standing near the tank north of the track, testified as follows:

"Q.—When did you first see the train? A.—Well, before Bunting got towards the railroad track I heard a kind of a dumb sound coming, and I imagined it was the train. I didn't see it at all until two seconds before it struck Bunting and his team.

"Q.—When his team got as far as the north side track, if he had looked up the track toward the west, do you think that he could have seen a train? A.—To the best of my opinion I don't think that he could from where he was, with the cars on the north side track. * * * I don't think that he could have seen the train. I don't think that he could over the cars."

We did not deem it necessary to criticise the form of the question, propounded by appellant's counsel, in answering the point now under consideration, because if "there was

a decided conflict of evidence upon this point," as we stated, that was, and is, not only a conclusive answer to the question, but is decisive of the case so far as this point is involved.

But inasmuch as the learned counsel has again referred, with so much confidence, to "the mathematical demonstration as to the ability of the plaintiffs to see the approaching train had they looked for it as they came near the crossing," and again argued the case upon the assumption that if it was possible for them to have seen the train at any given point before coming upon the main track, they were guilty of contributory negligence because they did not see it, we deem it proper to say that, in our opinion, the question for the jury and court to decide was not "whether the plaintiffs might have seen the train of the defendant had they looked" at some particular point, but whether under all the facts and circumstances testified to in this case, they made reasonable efforts to see and hear the approaching train and, in this respect, exercised the due care and caution which the law requires. (*Bunting* v. *C. P. R. R. Co.*, 14 Nev. 361; *Moore* v. *C. R. R. Co.*, 47 Iowa, 690; *Voak* v. *N. C. R. R. Co.*, 75 N. Y. 323; *Laverenz* v. *C. R. I. and P. R. R. Co.*, The Reporter, vol. 13, 45.)

In *Shaw* v. *Jewett* the facts were in many respects similar to the case under consideration. Folger, C. J., in delivering the opinion of the court of appeals, said: "The court was asked to charge the jury, that if they believed that the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part, and he was not entitled to recover. The court refused the instruction, and exception was taken. We think that the court did not err. The request was so couched, that if the proposition folded up in it had been given as law to the jury, it would have laid down as the rule that the plaintiff was bound to see the train at the distance named, if it were possible that it could be seen by any one from there. That is not the rule. The plaintiff is not bound to see. He is bound to make all reasonable efforts to see that a careful,

prudent man would make in like circumstances. He is not to provide any certain result. He is to make effort for a result that will give safety; such effort as caution, care, and prudence will dictate. * * * The question for the jury was not alone whether he could have seen the coming train at the indicated distance from the track, but whether, when at that distance, he looked and listened for it, and whether it was so plain that at that distance he could and would have seen it if he had looked; that his not seeing it was proof that he did not look." (The Reporter, vol. 13, 22.)

2. We agree with counsel, that when a train is passing over the road, and the engineer, while keeping a reasonable lookout, "observes a team *at a safe distance from the track*, he is not required to slacken his speed or stop his train * * * in order to ascertain whether the traveler upon the highway has made up his mind to pause and let the train go by, or to go upon the track and stop the train," but has the right, as we stated in *Solen* v. *V. & T. R. R. Co.*, 13 Nev. 123, "to act upon the assumption that a traveler, in walking upon or driving across its track, will use due care and prudence to avoid impending danger." (*Cohen* v. *Eureka & P. R. R. Co.*, 14 Nev. 394.)

There is nothing in the instructions reviewed by us, or in the opinion heretofore rendered, in conflict with these views. But it is also the rule that railroad companies, as well as travelers, must exercise reasonable care and caution, and in the present case, although the plaintiffs may not have been entirely free from fault, if the engineer of defendant's train saw the plaintiffs' team, as it was coming upon the track, *in a position of great peril and danger*, and he could, by the exercise of reasonable care, have lessened the speed of his train, or stopped it, with safety, in time to have avoided the collision, it was his duty to do so.

Rehearing denied.

BELKNAP, J., did not participate in this decision.

Argument for Appellants.

[No. 1,051.]

J. H. ALDERSON, RESPONDENT, *v.* JOSEPH MENDES ET AL., APPELLANTS.

SURETY ON OFFICIAL BOND CAN NOT RECOVER FULL DAMAGES FROM CO-SURETIES.—A surety upon an official bond, that is joint and several in form, can not recover from his co-sureties the full amount of damages he may have sustained by the wrongs of their common principal.

IDEM—DEFENSE TO SUIT—CIRCUITY OF ACTION.—In a case where one can recover against another, and the latter can turn around and recover the money back, the law, by way of rebuttal, and to avoid circuity of action, holds such liability a defense to the first action.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts sufficiently appear in the opinion.

C. J. Lansing and Crittenden Thornton, for Appellants:

I. An action can not be maintained by a surety upon an obligation who appears to be legally bound for the identical sum for which he sues, against all or any of his co-obligors. (1 Chitty Pl. 40; *Westcott* v. *Price*, Wright, 220; *Grahame* v. *Harris*, 5 Gill & Johns. 498; *Eastman* v. *Wright*, 6 Pick. 316; *Warren* v. *Stearns*, 19 Id. 73; *Livingston* v. *Livingston*, Mills (S. C.), 428; *Portland Bank* v. *Hyde*, 2 Fairf. 196; *Griffith* v. *Chew*, 8 Serg. & R. 30; *Pearson* v. *Nesbitt*, 1 Dev. 315; *Andrews* v. *Callender*, 13 Pick. 484; *Harris* v. *First Parish*, 23 Id. 112; *Brigden* v. *Cheever*, 10 Mass. 450; *Mainwaring* v. *Newman*, 2 Bos. & Pul. 120; *Bosanquet* v. *Wray*, 6 Taunt. 597; *Harvey* v. *Kay*, 9 B. & C. 356; *Holmes* v. *Higgins*, 1 Id. 74; *Teague* v. *Hubbard*, 8 Id. 345; *Milburn* v. *Codd*, 7 Id. 419.)

II. Gilmore, the principal obligor on the undertaking on which the action is brought, is an indispensable party, not only to this, but to any action on the bond. (*People* v. *Love*, 25 Cal. 523; *City of Sacramento* v. *Dunlap*, 14 Id. 421; *Irwin* v. *Backus*, 25 Id. 214; *Mendocino Co.* v. *Morris*, 32 Id. 145; *People* v. *Evans*, 29 Id. 429; *People* v. *Hartley*, 21 Id. 585; *People* v. *Kneeland*, 31 Id. 288; *Sacramento Co.* v. *Bird*, Id. 66; *People* v. *Ross*, 38 Id. 76; *Placer Co.* v. *Dick-*

erson, 45 Id. 12; *Tevis* v. *Randall*, 6 Id. 632; *State* v. *Rhoades*, 7 Nev. 438; *Krutschnitt* v. *Hauck*, 6 Id. 163; *State* v. *Wells*, 8 Id. 105; *People* v. *Breyfogle*, 17 Cal. 510.)

III. The judgment in this case is erroneous on the face of the record. One surety can not recover from another at law, more than that other's proportion of the joint liability. (*Judah* v. *Mieure*, 5 Blackf. 171; *Bradley* v. *Burwell*, 3 Denio 61; *Stallworth* v. *Preslar*, 34 Ala. 505; *Pitt* v. *Pursord*, 8 M. & W. 538; *Lucas* v. *Curry*, 2 Bailey (Law), 403; *Johnson* v. *Johnson*, 11 Mass. 359; *Crowdus* v. *Shelby*, 6 J. J. Marsh. 62; *Lilderdale* v. *Robinson*, 2 Brock. 160; *Mauri* v. *Heffernan*, 13 Johns. 58; *Colt* v. *Learned*, 118 Mass. 380; 1 Wash. Real Prop. 651; *Challefoux* v. *Ducharme*, 8 Wis. 287; *Young* v. *De Bruhl*, 11 Rich. L. 638; *Clark* v. *Brown*, 3 Allen, 509; *Aldrich* v. *Martin*, 4 R. I. 520; *Shove* v. *Dow*, 13 Mass. 529: *Cutting* v. *Rockwood*, 2 Pick. 443; *Durant* v. *Johnson*, 19 Id. 544; *Sigourney* v. *Eaton*, 14 Id. 414; *Johnson* v. *Harris*, 5 Hayw. (Tenn.) 113.)

George W. Baker, for Respondent:

I. No authority is cited under the code which denies the right of maintaining an action in this form. The real question is, have the defendants been deprived of any right to plead the same defense they could have pleaded in an equitable action? The plaintiff in this case sues for two thousand dollars. If plaintiff would be legally liable for any portion of this sum in an action for contribution, that fact might have been shown if properly pleaded in this action, and the plaintiff's claim reduced to the extent of his liability. (1 Comp. L. 1112; *Crary* v. *Goodman*, 12 N. Y. 266; *Rindge* v. *Baker*, 57 Id. 209; *Cavilli* v. *Allen*, Id. 508; *Bruce* v. *Burr et al.*, 67 Id. 237; *Carpentier* v. *Oakland*, 30 Cal. 439; *O'Brien* v. *Perry*, 1 Black (U. S.), 132.)

II. The objection that the plaintiff has a legal interest in both sides of the controversy is answered by the case of *McDowell* v. *Jacobs*, 10 Cal. 388.

III. The plaintiff may sue all or any number of those liable on a joint and several undertaking, at his option.

(Civil Pr. Act, sec. 15; *People* v. *Love*, 25 Cal. 521; *Decker* v. *Trilling*, 24 Wis. 610.)

IV. In an action upon a joint and several bond it is unnecessary to join the principal. (*Brainard* v. *Jones*, 11 How. Pr. 569.)

V. This is an action for damages, caused by the wrongful and unauthorized act of the sheriff. It was not an injury sustained by all the sureties in common, but by the plaintiff alone; not because he was a surety on the undertaking of the sheriff, but because the wrongful act of the sheriff was committed against his property, just as it might have been against the property of any other citizen, and the plaintiff in bringing suit for such wrongful act is not controlled by the principles which govern actions for contribution.

VI. In an action between the sureties for contribution the plaintiff can be brought in and compelled to contribute his proportion of the amount of the damage sustained by the wrongful act of the sheriff with the other solvent sureties upon the undertaking. (*Bachelder* v. *Fiske*, 17 Mass. 464; *Burroughs* v. *Lott*, 19 Cal. 125.)

By the Court, BELKNAP, J.:

This is an action brought to recover the sum of two thousand dollars as damages for a breach of the conditions of the official bond of George W. Gilmore, formerly sheriff of the county of Eureka. The bond is joint and several in form, and was executed by Gilmore as principal, and twenty-seven other persons as sureties, among whom were the plaintiff and the two defendants against whom this action is brought. The breach consisted in the conversion of plaintiff's property by Gilmore, as sheriff, during his term of office. A demurrer was interposed to the complaint upon several grounds, one of which was that it did not state facts sufficient to constitute a cause of action. Upon the submission of the demurrer it was admitted that the plaintiff was a surety upon the bond, and thereupon bound in the sum of two thousand dollars. The court overruled

the demurrer, and its ruling in this regard is one of the grounds upon which this appeal is taken.

The question presented is, whether one who is himself a surety upon an official bond can recover from his co-sureties the full amount of damages he may have sustained by the wrongs of their common principal. If this question were answered in the affirmative and judgment passed against the defendants, there would be nothing to hinder them, after paying it, from recovering the same amount from the plaintiff; and thus the parties might alternately sue each other indefinitely. This would produce circuity of action, which the law does not permit. The principle to which actions of this character are obnoxious is thus stated in 16th Am. ed. of Chitty on Pleading, vol. 2, 363: "Whenever the rights of litigant parties are such that the defendant would be entitled to recover back from the plaintiff the same amount of damages which the plaintiff seeks to recover, the defendant may plead the facts which constitute such rights as a defense, for the purpose of avoiding circuity of action."

This subject was considered in the case of *Gray* v. *Coffin*, 9 Cush. 206, under a statute imposing a personal liability upon stockholders for the payment of the debts of insolvent corporations. In that case it was sought to enforce payment of the debt of an insolvent corporation against one of its stockholders by a creditor who was himself a stockholder. The court said: "And it is further argued that, because he may be the creditor, and have a judgment against the corporation, he may also, like any other creditor, have the collateral remedy over upon any individual member, as provided for by this statute. But this is by no means a just conclusion. The obligation is declared by this statute, but the remedy, as the case supposes, is sought at the common law; it must, therefore, be limited and controlled by the rules of the common law. Now, if the member, who has become a creditor of the corporation, say A. could recover against B., another member, B., by paying the debt, would, in his turn, become a creditor of the corporation, and might have his action against any one or all of the other members,

and, amongst the rest, against A., to recover the money back again. Now when a case is so situated that, if one can recover against another, and the latter can turn round and recover the money back, the law, by way of rebuttal, and to avoid circuity of action, holds such a liability a defense to the first action. Supposing, by way of illustration, that there be a note in circulation, with a promisor and several indorsers, of whom A. is the first and B. the second; it is indorsed by several others, and subsequently, in the course of business, comes again to A., as indorsee, after these other indorsements. As such indorsee, A. sues B. as his prior indorser, which any other indorser might do. B. answers that, though true it is, he is liable to pay it to A., as indorsee, yet he would have an immediate action over against A. as his prior indorser, and this shall be a good defense by way of rebuttal." (*Mitchell* v. *Turner*, 37 Ala. 660; *Bailey* v. *Bancker*, 3 Hill, 188.)

We are of opinion that this action can not be maintained. Judgment reversed.

[No. 1,067.]

FLOWERY MINING COMPANY, APPELLANT, *v.* NORTH BONANZA MINING COMPANY ET AL., RESPONDENTS.

DEED—RECORDING OF SEAL NOT NECESSARY—WHEN ENSEALING WILL BE PRESUMED.—The recording of the seal to a deed is not absolutely essential. If the original instrument can not be produced, and the record thereof is offered in evidence, the existence of the seal will be presumed from the statement in the deed that the grantor did set his hand and affix his seal thereto, and from the attestation clause that it was signed, sealed, and delivered in the presence of witnesses.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

R. H. Taylor and *E. F. Preston*, for Appellants:

The court erred in sustaining the objection to the offer

made of secondary evidence of the deed. The deed shows an ensealing. The subscribing witnesses attest the ensealing. The presumption is that it was sealed, and the burden of proof is upon the party making the objection. *Omnia præsumuntur rite et solleniter esse acta donee probetur in contrarium.* (*Gray* v. *Gardiner*, 3 Mass. 398; *Pejepscut* v. *Ransom*, 14 Mass. 144; *McQueen* v. *Farquhar*, 11 Ves. 467; *Marine Inv. Co.* v. *Haviside*, 5 (L. R.) Eng. & Irish App. 630; 2 Best on Ev., sec. 362; *Talbot* v. *Hodson*, 7 Taunt. 251; *Burling* v. *Paterson*, 9 C. & P. 572; *Doe* v. *Phelps*, 9 Johns. 169; *Supervisors* v. *White*, 30 Barb. 78; *McBurney* v. *Gutler*, 18 Id. 211; *Jones* v. *Martin*, 16 Cal. 166; *Estate of Sticknoth*, 7 Nev. 234.)

Lewis & Deal, for Respondents:

I. The word deed, as used in the statute (1 Comp. L. 76), means a written instrument under seal. That is not only the legal meaning of the word, but its common signification. (Bouv. Dic. 444; 1 Comp. L. 96; Civ. Pr. Act, sec. 234.)

II. A deed of real estate must be under seal, except where that formality is dispensed with by statute. (3 Wash. on Real Prop., 244, 245; 2 Hill. on Real Prop. 424, 425; *Lessee of Merritt* v. *Horne*, 5 Ohio St. 319; 4 Crui. 28; *Underwood* v. *Campbell*, 14 N. H. 396; 1 Chitty on Cont. 4; 1 Wait's Actions and Defenses, 674.)

III. There being no seal indicated in the record, there is no more presumption that there was a seal than there would have been if the original deed had been presented without a seal. (*Chilton* v. *People*, 66 Ill. 501.)

IV. The record offered must stand for itself, and can not be aided by any presumptions. (*Downing* v. *Haxton*, 21 Kan. 178; *Georgia R. R. Co.* v. *Hamilton*, 59 Ga. 171.)

V. Without the production of the subscribing witness and his testimony as to the fact of the ensealing of the deed, the record stands as if there had been no subscribing witness. If the original deed had been produced, it would have been necessary to produce the witness himself to prove

the execution of the deed. (1 Greenl. on Ev., secs. 569 and 569, A.)

By the Court, HAWLEY, J.:

Upon the admission of defendants' counsel that the original deed was lost, the plaintiffs offered in evidence the record of a deed from the Flowery mining company, executed by William I. Cummings, late sheriff of the county of Storey, to John W. McKenney, as secondary evidence of its contents.

The attestation clause reads as follows:

"In witness whereof, the said sheriff, the said party of the first part, has hereunto set his hand and seal, the day and year first above written. W. I. Cummings, late sheriff. * * * Signed, sealed, and delivered in the presence of Philip Stoner."

This deed was properly acknowledged before a notary public. The defendants objected to the admission of this deed in evidence upon the ground that there was no proof of the ensealing of the deed. The court sustained the objection and granted a nonsuit. Did the court err in excluding the record of the deed as evidence? The decisions, rendered upon the principles of the common law, all declare that it is just as necessary that a deed should be sealed as that it should be signed and delivered. The respondents' counsel, therefore, claim that the record, in the absence of any evidence to the contrary, must be taken as conclusive that the original deed was not sealed. This position has much reason to support it, and is sustained by *Switzer* v. *Knapp*, 10 Iowa, 75, where the court said: "The complainant further asks, what if the copy does not show a seal. A scroll stands for this, and how can a scroll be copied? It is copied the same as a seal is, by the word 'seal,' or by a scroll, or by this and the word 'seal,' or the letters 'L. S.' without it. The copy of a deed without any mark indicating a seal, is evidence that there was none."

On the other side, appellant contends that the ensealing of the deed will be presumed, and that the burden of proof,

to the contrary, rests upon the party making the objection. Counsel rely upon the authority of 1 Sugden on Powers, 283, where, after stating that sealing is essential to a deed, the author says that "where the instrument is a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear upon the parchment or paper." No authorities are cited, by the author, in support of this text. The text is, however, followed by Matthews on Presumptive Evidence, 36, and by Taylor on Evidence, sec. 128.

We agree with respondents' counsel, that the English cases cited by appellant do not support the text as above stated, and if the case rested upon the authorities presented in the briefs of the respective counsel, we would be inclined to sustain the action of the court in excluding the record of the deed. But, upon further examination, we find that a majority of the decisions in the United States are to the effect that the recording of the seal is not absolutely essential; that if the original instrument can not be produced, the existence of the seal will be presumed, from the statement in the concluding portion of the deed, that the grantor did set his hand and affix his seal thereto, and from the attestation clause, that it was signed, sealed, and delivered in the presence of witnesses.

In *Geary* v. *The City of Kansas*, 61 Mo. 379, no seal appeared on the record of the certificate of acknowledgment to the record copy of a deed. The court said: "It is not necessary for the recorder to attempt to copy the seal, nor is it necessary for him to note the place where the seal was placed in the original; the statement in the body of the certificate, that the clerk who made it affixed the seal of said court, authorizes the presumption that such seal was affixed, and the general current of authority favors this view. (*Hedden* v. *Overton*, 4 Bibb, 406; *Griffin* v. *Sheffield*, 38 Miss. 359; *Sneed* v. *Ward*, 5 Dana, 187; *Smith* v. *Dall*, 13 Cal. 510.)"

Our statute relative to the acknowledgment and record-

ing of conveyances is substantially the same as the statute of California. Terry, C. J., in delivering his opinion in *Smith* v. *Dall, supra*, said: "The conveyance itself is required to be copied into the record, in order that parties may determine its sufficiency and the character of the estate conveyed. To accomplish this end it is not necessary that the seal should be copied upon the book; it is enough if it appear from the record that the instrument copied is under seal. This, we think, is sufficiently shown by the record of the conveyance from Richardson. The deed purports to be under seal, and to have been signed, *sealed*, and delivered in the presence of the subscribing witness."

Sanderson, J., in *Emmal* v. *Webb*, 36 Cal. 203, considered that the question admitted of debate, but did not decide it. In a recent decision by Mr. Justice Field, of the supreme court of the United States, he adds the weight of his judicial sanction in terms direct, clear, and explicit, to the principles announced in *Smith* v. *Dall*. In *Le France* v. *Richmond*, 5 Sawy. 603, he said: "There is no doubt that a seal is essential to a conveyance of real property. * * * The general doctrine with reference to instruments by which real property is transferred is the same in California as in other states—the instruments must be sealed. The transfer *inter vivos* can only be made by deed, and a deed implies sealing; its definition is 'a writing sealed and delivered by the parties.' (2 Blackstone, 295.)"

After copying the text from Sugden on Powers, already quoted, he adds: "The presumption thus indulged is more just and natural where the original instrument is lost, and resort is had to secondary evidence of its contents. The statute, in providing for the record of deeds, does not require any note or entry by the recorder of the existence of a seal to the original; yet copies from the records are made admissible in evidence with the like effect as the originals, when the latter are beyond the possession or control of the party. The existence of the seal to the original must, therefore, in the majority of cases, where copies are used, be a matter of presumption, and the fact may be fairly presumed from any expressions in the conclusion of the instru-

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ment, as in the copy produced in the present case or in the attestation indicating that a seal was affixed."

In the light of these authorities we think the court erred in sustaining the defendants' objection.

The judgment of the district court is reversed, and the cause remanded for a new trial.

[No. 1,085.]

THE STATE OF NEVADA, RESPONDENT, *v.* CHARLEY HING, APPELLANT.

INDICTMENT FOR MURDER—WILLFUL, DELIBERATE, AND PREMEDITATED—MALICE AFORETHOUGHT.—In reviewing an indictment for murder: *Held*, that charging the homicide to have been with "malice aforethought" is tantamount to an averment that the act was "willful, deliberate, and premeditated."

ALLOWANCE OF CHALLENGE FOR IMPLIED BIAS—NOT SUBJECT OF REVIEW.—The allowance of a challenge for implied bias is not the subject of an exception.

IDEM—GENERAL OR PARTICULAR CAUSE OF CHALLENGE—CONSCIENTIOUS OPINIONS.—A juror was excused upon the ground that he entertained such conscientious opinions concerning capital punishment as would preclude his finding defendant guilty of an offense punishable with death: *Held*, that the objection to the juror did not go to the general cause of challenge; that he was disqualified from serving in any case, but to the particular cause, that he was disqualified from serving on the case on trial.

CREDIBILITY OF WITNESSES—INSTRUCTION.—In reviewing an instruction relative to the credibility of a witness jointly indicted with defendant: *Held*, that the attention of the jury may be directed to the peculiar circumstances surrounding any witness that are proper to be considered in determining the weight to be attached to his testimony.

OMISSION TO GIVE INSTRUCTIONS.—The omission of the court to instruct a jury upon any particular point, when the same is not definitely requested, is not the subject of an exception,

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts appear in the opinion.

L. A. Buckner, for Appellant.

M. A. Murphy, for Respondent.

By the Court, BELKNAP, J:

Appellant was convicted of the crime of murder of the first degree, and sentenced to be executed. He appeals from the judgment and from an order overruling his motion for a new trial. The first assignment of error arises upon the action of the court in overruling a motion in arrest of judgment, founded upon the alleged insufficiency of the indictment to support a judgment of conviction of murder of the first degree.

The indictment charges that the defendants Charley Hing and Tang Yan, "on the eighth day of May, A. D. 1881, or thereabouts, and before the finding of this indictment, at the said county of Humboldt, state of Nevada, without authority of law and with malice aforethought, killed," etc. The statute defining the degrees of murder provides, "all murder which shall be perpetrated by poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree. * * *"

From this definition of murder of the first degree, it is argued that as the indictment failed to aver willfulness, deliberation, and premeditation, which are essential constituents of the crime of murder of the first degree, it does not support the judgment rendered. The statute declares that the indictment shall be sufficient if it can be understood therefrom "that the act or omission charged as the offense is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended," (Sec. 2323, Comp. L.)

The indictment meets all of the requirements of this section of the statute; it follows the form prescribed by the legislature for indictments for murder, in charging the act to have been done with "malice aforethought," and such charge is tantamount to an averment that the act was "will-

ful, deliberate, and premeditated." (*People* v. *Dolan*, 9 Cal. 576; *People* v. *Murray*, 10 Id. 309; *People* v. *Vance*, 21 Id. 400; *State* v. *Thompson*, 12 Nev. 140; *State* v. *Crozier*, Id. 300.)

The next point relied upon is the allowance of a challenge by the district attorney for implied bias to one James A. Robinson, who had been returned upon the venire, and who was excused upon the ground that he entertained such conscientious opinions concerning capital punishment as would preclude his finding a defendant guilty of an offense punishable with death.

In *State* v. *Larkin*, 11 Nev. 314, and in *State* v. *Pritchard*, 15 Id. 79, this court held that the allowance of a challenge for implied bias was not the subject of an exception. So it has been repeatedly held by the supreme court of California under a statute similar to ours. (*People* v. *Murphy*, 45 Cal. 137; *People* v. *Cotta*, 49 Id. 167; *People* v. *Vasquez*, Id. 560; *People* v. *Atherton*, 51 Id. 495.)

The reason upon which this ruling is based is well stated in *People* v. *Murphy*, 45 Cal. 142, in the following language:

"By the criminal practice act (sec. 433) it is provided that an exception may be taken to the decision of the court upon a matter of law in *disallowing a challenge to a juror for implied bias*. The action of the court in *allowing* such a challenge is not included, but is omitted, and *ex industria* omitted; in other words, excluded by the statute itself as forming the subject of an exception. This distinction was pointed out by the attorney general, in *People* v. *Stewart*, 7 Cal. 140, but was then apparently overlooked by the court —at least it was not adverted to in the opinion delivered in that case. The reason, and it is a sensible one, upon which the statute proceeds, is that when a competent jury, composed of the requisite number of persons, has been impaneled and sworn in the case, the purpose of the law in that respect has been accomplished; that, though in the impaneling of the jury one competent person be rejected, yet, if another competent person has been substituted in his stead, no injury has been done to the prisoner, certainly no

injury which a new trial would repair, because even should a venire *de novo* be awarded, it is not pretended that the prisoner could insist upon the excluded person being specially returned upon the panel. The result would be that the prisoner would probably be tried again by another competent jury, of which the excluded person would not be a member, and so the new trial would only be to do over again that which had been done already."

Upon this subject it is further contended that the action of the court should be reviewed because the ground of challenge is, in fact, general rather than particular.

Section 1961 declares: "A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either: First, general, that the juror is disqualified from serving in any case; or second, particular, that he is disqualified from serving in the case on trial." Section 1963 defines implied bias to be such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and this is properly made one of the particular causes for challenge The subsequent section, in its ninth subdivision, declares that if the offense charged be punishable with death, the entertaining of such conscientious opinions by the juror as would preclude his finding the defendant guilty, shall be cause for challenge for implied bias. It is apparent that the objection to the juror did not go to the general cause of challenge, that he was disqualified from serving in any case, but to the particular cause that he was disqualified from serving on the case on trial.

The third objection is taken to the giving of an instruction touching the matters proper for the jury to consider in determining the credibility to be given to the testimony of Tang Yan, who was jointly indicted with appellant.

The instruction is as follows: "The defendant, Tang Yan, has offered herself as a witness in behalf of the defendants in this trial, and in considering the weight and effect to be given to her evidence, in addition to noticing her manner and the probability of her statements, taken in connection with the evidence in the cause, you should consider

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her relation and situation under which she gives her testimony, the consequences to her relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in her situation. You should carefully determine the amount of credibility to which her evidence is entitled. If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."

The point of the objection appears to be that whilst this instruction was correct in so far as the testimony of Tang Yan applied to herself, it placed her testimony relating to appellant in a less favorable light before the jury than that of the other witnesses. The objection is untenable. Whilst it is customary for courts to instruct juries in reference to the testimony of defendants in criminal cases, who offer themselves as witnesses, the attention of the jury may be directed to the peculiar circumstances surrounding any witness and proper to be considered in determining the weight to be attached to his testimony. Finally, it is claimed that the facts of the case required the application of a rule of law upon which no instruction was given. This objection is answered by the fact that no instruction on the subject was requested. The omission to instruct when not definitely requested is not the subject of an exception.

There being no error in the record, the order and judgment are affirmed and the district court directed to appoint a day for the execution of its sentence.

[No. 1,059.]

J. W. BROWN, RESPONDENT, *v.* L. A. ASHLEY, APPELLANT.

FORMER JUDGMENT—RES JUDICATA.—Where a former judgment has established the rights of the respective parties to the waters of a stream, the same question as between the same parties can not again be considered; it is *res judicata.*

ACTION FOR DIVERSION OF WATER—VINDICATION AND PRESERVATION OF A RIGHT—ADVERSE RIGHT.—Where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length

of time, would ripen into an adverse right, and deprive the plaintiff of his property, he is not only entitled to an action for the vindication of his right, but also for its preservation.

IDEM—WHEN INJUNCTION SHOULD ISSUE—NOMINAL DAMAGES—PRESENT USE OF WATER.—In actions for the diversion of water, where there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary to show actual damages, or a present use of the water, in order to authorize a court to issue an injunction and make it perpetual.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts sufficiently appear in the opinion.

R. M. Clarke, for Appellant:

I. The owner of land upon a natural watercourse is entitled to make a reasonable use of the water for irrigation. (Angell on Watercourses, secs. 119, 119a, 122; *Thurber* v. *Martin*, 2 Gray, 394; *Davis* v. *Winslow*, 51 Me. 290; *Perkins* v. *Dow*, 1 Root, 535; *Weston* v. *Alden*, 8 Mass. 136; *Anthony* v. *Lapham*, 5 Pick. 175; *Embrey* v. *Owen*, 6 Exch. 353; *Blanchard* v. *Baker*, 8 Greenl. 253; *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Gillett* v. *Johnson*, 30 Id. 183; *Evans* v. *Merriweather*, 3 Scam. 496; *Union M. & M. Co.* v. *Ferris*, 2 Saw. 190; *Union M. & M. Co.* v. *Dangberg*, 2 Id. 450.)

II. Any use of water by a riparian proprietor is reasonable, which does not deprive the lower proprietor of a beneficial use, and which does not work the lower proprietor a substantial injury and actual damage. (Angell on Watercourses, sec. 93a; *Union M. & M. Co.* v. *Ferris*, 2 Saw. 176; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Embrey* v. *Owen*, 6 Exch. 353; *Howard* v. *Ingersoll*, 13 How. 426; *Farrell* v. *Richards*, 30 N. J. Eq. 511.)

III. The law of riparian proprietorship has no application and does not exist in this state. On the contrary, the law in force, governing the use of water, is that of appropriation. (*Lobdell* v. *Simpson*, 2 Nev. 274; *Ophir S. M. Co.* v. *Carpenter*, 4 Id. 534; *Barnes* v. *Sabron*, 10 Id. 217; *Hobart* v. *Wicks*, 15 Id. 418; Act of July 26, 1866, Rev. Stats. U. S., sec. 2339; *Atchison* v. *Peterson*, 20 Wall. 507;

Basey v. *Gallagher*, Id. 670; *Jennison* v. *Kirk*, 98 U. S. 453; *Broder* v. *Natoma W. Co.*, 101 Id. 274.) The common law, as held in England, is not applicable to our situation, and therefore is not the rule of decision here. (Petition for rehearing, *Vansickle* v. *Haines;* Cooley's Const. Lim. 12; 2 Pet. 144; 27 Cal. 482; *Boyer* v. *Sweet*, 3 Scam. 120; *Middleton* v. *Pritchard*, Id. 510.)

IV. The decree prevents defendant from using water, first, when it would not reach plaintiff if not used; and secondly, from using the surplus which plaintiff does not use or require. This is contrary to all reason, against all principle, and subversive of the best interests of the country. (See authorities before cited.)

V. The former judgment is not conclusive, because properly interpreted it does not deny the use which defendant was making of the water. (See cases cited to support paragraph II.)

Lewis & Deal, for Respondent:

The rights between the parties to this action, as to the use of waters of Coyote creek, were determined by the former decree of the lower court.

R. M. Clarke, in reply:

I. If the former judgment existed and was in force, it was *res adjudicata* between the parties, and was an estoppel as to all matters which it involved: the same subject-matter could not be litigated again. (*Jackson* v. *Lodge*, 36 Cal. 28; *Jones* v. *Petaluma*, Id. 230; *Barnum* v. *Reynolds*, 38 Id. 643.) The respondent could no more litigate the subject-matter over again than the appellant. The estoppel is mutual and concludes both parties.

II. Admitting for argument respondent's title to the water, and conceding appellant's violation of his strict right, and respondent's technical right to have nominal damages, nevertheless appellant should have had judgment for his costs. Where the action is trespass, the injury reparable, the damages nominal, no injunction will lie, although the title of plaintiff is undisputed. (*Thorn* v. *Sweeney*, 12 Nev. 251.)

III. In any event the decree is broader than the law warrants, and should be modified or reversed.

IV. The former decree must be interpreted in the light of the settled principles of the law; and the denial therein of the right to use the waters of the stream for irrigation must be limited to such use as will injure respondent and work him actual damage. It can not be construed to deny appellant the right to the surplus water in time of flood.

By the Court, HAWLEY, J.:

In 1876 the plaintiff obtained a judgment against defendant for damages and costs, and a decree "that plaintiff is the owner of the lands, tenements, and hereditaments mentioned in plaintiff's complaint, and that he is a riparian owner and proprietor in respect to said lands and Coyote creek, the stream mentioned in plaintiff's complaint, and that he is entitled to have *all* the waters of said stream come down unobstructed to and upon said lands, except that defendant may use such portion of said waters as may be necessary for domestic purposes *and not for irrigation.*"

In the present action, the complaint, among other things, alleges, and the court finds, that defendant, during the years 1877, 1878, and 1879, wrongfully and unlawfully turned out from the channel the waters of said Coyote creek and used the same for irrigating his land, and thereby prevented said waters from flowing down upon the lands of plaintiff, as they otherwise would have done. The plaintiff pleaded the former judgment and decree.

The court, in its finding of facts, states that defendant did not divert the waters of the creek "except during the freshet season of said years and during that portion of the dry season of said years when if not so diverted by defendant said water would have been absorbed by the soil and atmosphere * * * before it reached the lands of plaintiff," and that the volume of water was not, by the acts of defendant, so diminished "as in any manner to deprive plaintiff of sufficient water to irrigate" the crops growing on his lands, and for all domestic purposes.

Judgment was rendered in favor of the plaintiff for one

dollar damages, and a decree was entered substantially the same as in the former action, and the defendant was enjoined "from ever hereafter diverting or obstructing in any manner any of said waters of said creek from the natural channel thereof, so as to prevent said waters, or any portion thereof, from flowing down to or upon the plaintiff's said lands."

The former judgment was rendered on the merits, and it is conclusive between the parties as to their respective rights to the waters of Coyote creek.

Conceding that the former judgment was too broad, and that it would have been modified if the proper objection had been made, still it is apparent, upon well-established principles of law, that the same question can not again be considered. It is *res judicata.* (Freeman on Judgments, sec. 249, and authorities there cited.)

The diversion of the waters of Coyote creek, by the defendant, was a violation of plaintiff's rights, as established by the former decree, and entitled him to nominal damages, and to the decree and injunction which he obtained in the second action. (*Barnes* v. *Sabron,* 10 Nev. 247.)

The judgment of the district court is affirmed.

UPON REHEARING.

By the Court, HAWLEY, J.:

We granted a rehearing in this case, in order to give appellant an opportunity to re-argue the questions whether the court erred in granting the injunction and in allowing costs. A re-examination of the authorities has strengthened our conviction that the former opinion was correct in every particular.

Thorn v. *Sweeney,* 12 Nev. 251, upon which appellant relies, has no special application to the facts of this case. The principle therein announced, that a court of equity will not issue an injunction in cases of mere trespass where the injury complained of is not committed under any general claim of right or title in the defendant, and where there is no appreciable damage, and the remedy at law is ample, is well settled.

But it is equally as well settled by the authorities, that

where the act complained of is committed by the defendant, under a claim of right, which, if allowed to continue for a certain length of time, would ripen into an adverse right, and deprive the plaintiff of his property, the plaintiff is not only entitled to an action for the vindication of his right, but also for its preservation. This is especially true of actions for the diversion of water where there is, as in the present case, a clear violation of an established right and a threatened continuance of such violation. (Goddard on Easements, 423–4; Ang. & Ames on Watercourses, 135; *Barnes* v. *Sabron*, 10 Nev. 247; *Parker* v. *Griswold*, 17 Conn. 302–5; *Stein* v. *Burden*, 24 Ala. 148.)

In such cases it is not necessary to show actual damages, or a present use of the water, in order to authorize a court to issue an injunction and make it perpetual. (*Webb* v. *The Portland Manufacturing Company*, 3 Sum. 197; *Holsman* v. *Boiling Springs B. Co.*, 14 N. J. Ch. 343; *Corning* v. *Troy I. & N. F.*, 34 Barb. 491–2; 40 N. Y. 191; 39 Barb. 326–7; *Crosby & Sons* v. *Lightowler*, 3 Eq. Cas. (L. R.) 296-8; *Lyon* v. *McLaughlin*, 32 Vt. 425; Kerr on Injunctions, 393 (34); 226 (2); Ang. on Watercourses, sec. 449; High on Injunctions, sec. 556.)

In *Webb* v. *Portland M. Co.*, the court, in discussing this question, said: "If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs. A court of equity will not indeed entertain a bill for an injunction in case of a mere trespass fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill."

Points decided.

In *Corning* v. *Troy I. & N. F.*, 40 N. Y. 206, the court said: "No man is justified in withholding property from the owner when required to surrender it, on the ground that he does not need its use. The plaintiffs may do what they will with their own. Upon established principles this is a proper case for equity jurisdiction. First, upon the ground that the remedy at law is inadequte. The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies can not restore it to them and secure them in the enjoyment of it. Hence, the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to the equitable relief sought is established by authority as well as principle."

The court did not err in taxing the costs of this suit against defendant. (*Brown* v. *Ashley*, 13 Nev. 252.)

The judgment of the district court is affirmed.

[No. 1,069.]

B. B. STRAIT ET AL., APPELLANTS, *v.* C. A. BROWN ET AL., RESPONDENTS.

PRIOR APPROPRIATION OF WATER.—Prior appropriation gives the better right to running waters upon the public lands, to the extent of the appropriation.

DISTINCTION BETWEEN RUNNING WATER AND WATER PERCOLATING THROUGH THE SOIL.—Percolating water existing in the earth is not governed by the same laws that pertain to running streams. No distinction exists between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the

surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions.

IDEM — FACTS—LAW OF PERCOLATING WATERS NOT APPLICABLE. — The waters of "Warm Springs," at one time, flowed through a natural surface channel to Duckwater creek. The calcareous properties of the waters of the springs have formed a light, porous limestone by which the natural channel from the slough (near the springs) to the creek has been closed, and by some subterranean means, which are not satisfactorily established, the waters find their way to the creek. The springs are the source of the creek, and the diversion of the water from the springs, by the defendants, appreciably diminished the volume of water naturally flowing in the creek: *Held*, upon the facts, that the law of percolating waters was not applicable, and that the law of appropriation must govern the case.

IDEM—SUBTERRANEAN STREAMS.—Later appropriators can not lawfully acquire rights to the waters of the springs which constitute the source of the creek, simply because the means by which the waters are conveyed from the springs to the creek are subterranean and not well understood.

APPEAL from the District Court of the Fifth Judicial District, Nye County.

The facts sufficiently appear in the opinion.

R. M. Clarke, for Appellants:

I. The spring being the source of the stream, and being connected with it by subterranean channels, is in law part of it; and defendants have no more right to turn the water out of the springs than out of the stream itself. (Aug. on Waterc., sec. 112 a, b, c; *Wheatley* v. *Baugh*, 25 Pa. St. 528; *Arnold* v. *Foot*, 12 Wend. 330; *Smith* v. *Adams*, 6 Paige, 435; *Frazer* v. *Brown*, 12 Ohio St. 300; *Brown* v. *Illius*, 25 Conn. 583.)

II. The principle governing percolating waters has no application to this case. Defendants do not own the land where the spring is situated, and do not cut off its hidden percolating supplies by a proper use and enjoyment of soil which belongs to them. They can not invoke the maxim, *cujus est solum ejus est usque ad cœlum*. (Ang. on Waterc., secs. 109–112; *Dexter* v. *Providence Aq. Co.*, 1 Story, 387; *Balston* v. *Bensted*, 1 Campb. 463; *Dickinson* v. *Grand J. C. Co.*, 7 Exch. 282.) The waters are not percolating. The uncertainty which is the reason of the rule does not exist. The

spring is the ascertained and determined source of the stream, (Ang. on Waterc., sec. 114 c; *Roth* v. *Driscoll*, 20 Conn. 533.)

C. J. Lansing, for Respondents:

I. The record fails to show that there is any defined, known, and existing surface or subsurface channel or watercourse through which the waters of "Warm Springs" usually flow into Duckwater creek. No action lies for the diversion of any subterranean waters, or to determine correlative rights thereto. If there be such diversion resulting in damages to the plaintiffs it is *damnum absque injuria*. The plaintiffs, in order to maintain this action against the defendants, must prove a natural, visible watercourse, or surface channel through which the waters of the Warm Springs usually flow into Duckwater creek. (*Chasemore* v. *Richards*, 7 H. L. Cases, 349; *Acton* v. *Blundell*, 12 M. & W. 324; *Rawtrom* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbotham*, Id. 602; *Trustees* v. *Youmans*, 50 Barb. 316; 45 N. Y. 362; *Goodall* v. *Tuttle*, 29 Id. 459; 35 Id. 528; 8 Wisc. 369; High on Inj., secs. 509, 556; 9 Cush. 174; 11 Id. 195; 108 Mass. 219; 21 Barb. 230; 4 Coms. 195; Wash. on Eas., sec. 7; 18 Pick. 117; *Wheatley* v. *Baugh*, 25 Pa. St. 528; *Hanson* v. *McCue*, 42 Cal. 303; 27 Id. 476; 33 Id. 316; 18 Pick. 117; Ang. on Waterc., secs. 112, 114; *Brown* v. *Illius*, 25 Conn. 583; *Bassett* v. *Salisbury Mfg. Co.*, 43 N. H. 569.)

By the Court, BELKNAP, J.:

This is a suit in equity to establish the right of the plaintiff to the waters of Duckwater creek. The sources of this creek are springs, known as the "Warm Springs," the waters of which, after running a short distance through a natural surface channel, are discharged into a large slough. This slough has no natural surface outlet. Its westerly border consists of concretionary limestone, formed by the waters, and this formation extends to the defined surface channel of the creek, a distance of about half a mile. The land thereby embraced is a portion of the unoccupied pub-

lic domain, and is unfitted for agricultural or other purposes. Its surface gradually slopes from the lake to the creek. The waters of the creek were appropriated by the plaintiffs during the years 1867, 1868 and 1869 for the purpose of irrigating their farming lands adjacent thereto, and ever since then plaintiffs have used the waters for the purpose of their appropriations, except when deprived thereof by the acts of the defendants hereinafter stated.

In the year 1875, the defendants, in order to obtain water for the purpose of irrigating their lands, which are so situated that they can not be irrigated by waters from the creek, diverted the waters of the Warm Springs for this purpose. The principal object of this suit is to restrain defendants from diverting these waters.

The court before whom the cause was tried, was assisted in the determination of the questions of fact involved by a jury, to whom certain interrogatories were submitted. The court adopted the answers of the jury to the interrogatories, and in connection therewith made further findings of facts. Many of the interrogatories submitted to the jury, as well as the findings made by the court, were addressed to the question of the mode by which the waters of the springs reach the creek. Upon this subject there is a conflict in the findings. For instance: The following interrogatory was submitted to the jury:

"Is there any subterranean stream or percolation of water from Warm Springs to Duckwater creek?" To which the jury responded, "No." Afterward they answered, "Yes," to the following interrogatory: "Do the waters of the Warm Springs connect with Duckwater creek and furnish part of the waters usually flowing therein by subterranean channels?" But throwing out of view the question of conflict in the findings, and considering all of them together, we think we are justified in assuming that at an indefinite time the waters of the springs flowed through a natural surface channel to the creek; that the calcareous properties of the waters of the springs have formed a light, porous limestone, by which the natural channel from the slough to the creek has been closed, and that by some subterranean

means, which do not appear to have been satisfactorily established to court or jury, the waters of the springs find their way to the creek. There is no conflict with the finding that the springs are the source of the creek, and that the diversion by the defendants appreciably diminishes the volume of water naturally flowing in the creek. Upon these facts the district court rendered judgment in favor of defendants.

No question of riparian proprietorship arises in this case. Both parties claim by virtue of appropriations of the waters. The doctrine of appropriation of surface waters as established in the Pacific states is conceded by respondent. This doctrine declares that prior appropriation gives the better right to running water upon the public lands to the extent of the appropriations. If this law, as thus established, is applicable to the facts of this case, the judgment must be reversed.

Counsel for respondents contend that the judgment should be sustained, because there is no known or defined channel through which the waters of the springs reach the creek; that if these waters at all reach the creek, they do so by percolation or other unknown means, and that to such cases the law of watercourses does not apply.

It has been conclusively established by a long line of decisions that percolating water existing in the earth is not governed by the same laws that have been established for running streams. No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions. The grounds for the distinctions are clearly pointed out in the authorities.

The subject was carefully considered in the case of *Chatfield* v. *Wilson*, 28 Vt. 54. The court there said: "The secret, changeable, and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we can not well subject it to the regulations of law, nor build

upon it a system of rules, as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be *seen* and *known*, and is *uniform*. They are not in the earth and a part of it, and no secret influences move them, but they assume a distinct character from that of the earth, and become subject to a certain law—the great law of gravitation.

There is, then, no difficulty in recognizing a right to the use of water flowing in a stream as private property, and regulating that use by settled principles of law.

We think the practical "uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases."

In *Haldeman* v. *Bruckhart*, 45 Pa. St. 519, upon this subject, the court said: "In case of an underground supply to a spring or well, or a stream emerging upon land of a lower proprietor, the water does not flow openly in the sight of the owner of the soil under which it passes, there is, therefore, no reason for implying consent or agreement between the proprietors of the adjoining lands beneath which underground currents exist, which is one of the foundations upon which the law as to surface streams is supposed to be built; and for the same reason no trace of positive law can be inferred. Again, if the lower proprietor has a right to the undisturbed flowage of water through subterranean passages in his neighbor's land, he has the power of preventing that neighbor from using the water on his own soil, for he can not use it and return it to its old passageway, which he may do in the case of a surface stream. Such a right, if it exists, also exposes the upper proprietor to the hazard of incurring fruitlessly heavy expenditures in efforts to improve or use his land, since he can have no knowledge until after his outlay is made, that his contemplated use will interfere with any rights or interests of an adjoining owner. A surface stream can not be diverted without knowledge that the

diversion will affect a lower proprietor. Not so with an unknown subterranean percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself or that other can have any knowledge. No such right can be supposed to have been taken into consideration when either the upper or lower tract was purchased. The purchaser of lands on which there are unknown subsurface currents, must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of land upon which a spring rises, ignorant whence and how the water comes, can not bargain for any right to a secret flow of water in another's land. It would seem, therefore, most unreasonable that the latter should have a right to prevent his neighbor from enjoying his own land in the ordinary way, either by digging wells, cellars, drains, or by quarrying and mining."

Because of these reasons courts have treated percolating waters as part of the soil, and upon the principle that the owner has the land, even to the sky and to the lowest depths, have permitted him to dig as deep and build as high as he pleased.

Accordingly, in *Mosier* v. *Caldwell*, 7 Nev. 363, a case involving the rights of adjoining owners of land to water percolating through the soil, this court followed the general current of authority. In that case plaintiffs appropriated the waters of a spring upon their own lands. Afterwards the defendants, owning adjoining lands, dug a well thereon. The excavation caused the spring to dry up, but there was no visible connection between the spring and the well, the flow of water being by percolation. It was held that the damage done by defendants sinking their well was not the subject of legal redress.

We fail, however, to appreciate the force of the argument that undertakes to make the law of percolating waters applicable to the facts of the case under consideration. One of the defendants, it is true, is the owner of the land upon which the Warm Springs are situated, and it is also true, as a general principle, that the owner of land in its proper enjoyment may cut off or divert with impunity the water per-

colating through his soil; but the difficulty of defendants' position is that they have not been sued for diverting percolating waters. It is not charged that in digging drains, sinking wells, or working mines, or otherwise improving their property, they have interfered with waters percolating through the earth, as was the fact in the cases to which we have been referred. On the contrary, they have gone to the source of the creek and diverted living surface waters.

To these waters plaintiffs had acquired a prior right by virtue of an earlier appropriation. But because in passing from the springs to the creek the waters either percolate through the earth or are conveyed by unknown subterranean channels, it is urged that the law relating to percolating waters should be applied.

It seems clear that none of the reasons upon which the law of percolating water is based exist in this case. Here there is no uncertainty, either as to the existence of the water or the amount of water which defendants have taken from plaintiffs. Nor is it reasonable to suppose that defendants could have been ignorant of the effect which their diversion of the waters would produce upon the plaintiffs lower down the creek. It may fairly be assumed that plaintiffs acquired their lands from the fact that the waters of the creek could be made available for irrigation; and, having appropriated the waters prior to the appropriation made by defendants, such prior appropriation should be protected.

It would be a mere pretense of protection of the rights acquired by the earlier appropriators of the waters of the creek to say that later appropriators could lawfully acquire rights to the springs which constitute the source of the creek simply because the means by which the waters are conveyed from springs to creek are subterranean and not well understood. For these reasons we are of the opinion that the judgment is against law and should be reversed. As there may be a retrial of the case we consider it advisable to add that under the facts established, plaintiffs were entitled in their pleadings and evidence to treat the waters of the springs as a part of the creek. Judgment reversed.

[No. 1,073.]

S. SEVER ET AL., RESPONDENTS, *v.* E. GREGOVICH, APPELLANT.

MINING GROUND—DISCOVERY INTEREST—WHEN ONE PARTY IS ESTOPPED FROM DENYING THE INTEREST OF OTHERS.—G. joined with S. in claiming a discovery interest in a mining location, and afterwards recognized his claim to the mining ground, including the discovery interest, as being valid, and accepted from S., and his grantees, their proportionate share of the money expended for work and labor upon the entire claim. G. subsequently relocated the entire claim in his own name, claiming that the original location was void, because the locators were not the discoverers of the lode, and because S. was at the time of the location an alien. S. became a citizen before the relocation of the claim: *Held*, that G. was estopped by his conduct and acts from denying the rights claimed by S. and his grantees as owners in the claim.

APPEAL from the District Court of the Third Judicial District, Esmeralda County.

The facts are stated in the opinion.

W. H. Tompkins and *A. C. Ellis*, for Appellant:

I. Sever and Gregovich were limited to two hundred feet each, for the reason that the discoverers of the Victor mine were the original discoverers of the lode on which the mine in controversy was located, and had availed themselves of the two hundred feet to which they were entitled on account of their discovery. The evidence offered was therefore material and relevant, and the court erred in rejecting it. He could not make a valid location of this mine. (Rev. Stat. U. S., secs. 2319, 2321; *Golden Fleece G. & S. M. Co.* v. *Cable Con. G. & S. M. Co.*, 12 Nev. 312; *Chapman* v. *Toy Long*, 4 Saw. 35.)

II. Sever could take nothing by a retransfer of part of the interest transferred by him to Evanovich, for the simple reason there was nothing to transfer or retransfer. (Sickels' Mining L. and D. 88, 96.)

III. The location of the mine by Sever being void, it was subject to relocation by any citizen of the United States.

P. Reddy and *T. H. Wells*, for Respondents:

Gregovich is estopped from denying the title of respondents. (3 Phil. on Ev. 367; 1 Greenl. on Ev. 22, 207; 1 Copp's Land Owner, 98.)

By the Court, HAWLEY, J.:

This is an action to recover the possession of an undivided one half interest in a mining claim. Plaintiffs obtained judgment and defendant appeals.

The facts are, that on the first of August, 1867, S. Sever and E. Gregovich located the mining ground in controversy, viz., six hundred feet in length of the George Washington lode, two hundred feet thereof being for a discovery claim; that on the fifteenth of February, 1873, Sever conveyed his interest therein, by deed, to B. Evanovich; that on the nineteenth of May, 1874, Evanovich conveyed the same interest to the plaintiffs; that on the twenty-fourth day of September, 1872, Evanovich declared his intention to become a citizen of the United States, and received his naturalization papers on the eighth of September, 1873; that on the sixth of June, 1876, Sever declared his intention of becoming a citizen, and afterwards, and before the relocation of the premises by the defendant Gregovich, he was duly naturalized, and became a citizen of the United States; that on the eighteenth of February, 1880, the defendant Gregovich relocated the mining ground in controversy in his own name, without the consent of plaintiffs, or either of them; that during all the time from the first location of the claim by Sever and Gregovich until the relocation of the premises, as above stated, the work and labor as required by the statutes of the United States, and the laws of Columbus mining district, where said claim is located, were performed by said parties, and that during all of said time said Evanovich, or said plaintiffs, with the consent and assistance of said defendant, and jointly with him, had the said work and labor performed, and that during said time the said Sever and Chiatovich have paid to the said Gregovich various sums of money for his doing their proportionate part of said work and labor.

Points decided.

Upon the trial, the defendant offered to prove that the Victor mining claim was discovered and located for several years prior to the first of August, 1867, and was upon the same lode as the George Washington claim. The object and purpose of this evidence was to show that the locators of the George Washington claim were not the discoverers of the lode.

Appellant, Gregovich, claims that the court erred in refusing to admit this testimony, and that Sever, being an alien at the time of the first location of the claim, had no right to hold or claim an interest therein, and for these reasons the relocation of the claim by himself was valid, and the respondents have no valid interest or claim to any portion of said mining ground. We are, however, of the opinion that the judgment of the district court is correct.

Appellant is not in a position to take advantage of the defects, if any exist, in plaintiff's title to the ground in dispute. He joined with Sever in claiming two hundred feet of the ground as a discovery claim, and afterwards recognized the claims of Sever, Evanovich, and Chiatovich to the mining ground, including the discovery claim of two hundred feet, as being valid. He accepted from them their proportionate share of the money expended for work and labor done upon the entire claim, and for these reasons he was and is estopped, by his conduct and acts, from denying the rights claimed by Sever and Chiatovich as owners therein. (1 Greenl. on Ev., secs. 207, 208; Herman on Estoppel, sec. 336; *Lessee of Merritt* v. *Horne*, 5 Ohio St. 318.)

The judgment of the district court is affirmed.

[No. 1,068.]

THE CARSON OPERA HOUSE ASSOCIATION, APPELLANT, *v.* J. H. MILLER ET AL., RESPONDENTS.

CONTRACT OF INDEMNITY—FILING MECHANIC'S LIENS.—A covenant, in a bond, "to secure the plaintiff and keep it harmless from all liens and claims of liens" is a contract of indemnity, and is not violated by simply permitting liens to be filed. It would only be broken when plaintiff was actually damnified by reason of liens or claims of liens.

Argument for Respondents.

MECHANICS' LIENS—WHEN PROPERTY OWNER CAN NOT WITHHOLD MONEY DUE CONTRACTORS.—In construing the statutes relating to mechanics' liens: *Held*, that plaintiff was not authorized to withhold any part of the contract price, until the suits to enforce the liens were pending, and that it could not refuse to pay money according to the contract until the contractors were in default.

IDEM—LIABILITY OF SURETIES.—If plaintiff had paid the contractors according to their agreement it could have held the sureties, although when the payments were made, suits to enforce liens had been pending, or if at that time plaintiff had suffered damages by compulsory satisfaction of liens filed.

IDEM — FAILURE TO MAKE PAYMENTS TO CONTRACTORS — RELEASE OF SURETIES.—The failure of plaintiff to pay the contractors according to the terms of the agreement, the contractors not then being in default, and the application of the money due the contractors to the satisfaction of liens filed before the completion of the contract, released the sureties upon the contractors' bond.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

R. M. Clarke and *T. Coffin*, for Appellant:

I. The failure of plaintiff to make the payments at the time specified in the contract, is not such a violation of the contract as will discharge the sureties. (Brandt on Suretyship, secs. 296, 345.)

II. After the liens were filed in the recorder's office, plaintiff had the right under the statute to retain any sums due upon the contract and apply the same in satisfaction of the liens.

C. S. Varian, for Respondents:

I. The question is whether the plaintiff has departed from its contract with the sureties. (*Quillen* v. *Arnold*, 12 Nev. 234; *Bragg* v. *Shain*, 49 Cal. 134; *U. S.* v. *Howell*, 4 Wash. C. C. 620; *Calvert* v. *Soudon Dock Co.*, 2 Keen, 638; Brandt on Suretyship, secs. 79, 80, 102, 345.)

II. The provision of section 10 of the lien law of 1875 is no part of this contract as claimed by plaintiff. (2 Pars. Con. 515; Bish. Con., secs. 573, 603.)

III. The contract was not to prevent the filing of liens,

but to save harmless against the results of such filing. There is a manifest distinction between an indemnity against liability and the consequences of the liability. (*Thompson* v. *Taylor*, 30 Wisc. 68; *Jones* v. *Childs*, 8 Nev. 121.)

IV. Payment at the time and in the manner specified was a condition of the contract assumed and to be performed by plaintiff. It must show performance. No demand by the contractors was necessary. (2 Pars. Con. 636; Bish. Con., sec. 700.)

V. All doubts are generally resolved in favor of the surety. (*Stull* v. *Hance*, 62 Ill. 52.)

By the Court, LEONARD, C. J.:

Respondents, Miller and Cook, entered into a contract with appellant, dated April 27, 1878, whereby the former agreed, within three months from that date, to fully erect, construct, and finish, with first-class material, to be furnished by them, a theater or opera building, in strict accordance with certain plans, details, drawings, and specifications adopted by the parties; also, to secure appellant and keep it harmless from all liens and claims of liens for material or labor upon said building, under the laws of the state; also, to execute and deliver to appellant a bond in the sum of ten thousand dollars, with sufficient sureties, conditioned that said Miller and Cook should perform the terms and conditions of said contract on their part; and appellant agreed to pay said Miller and Cook therefor the sum of ten thousand one hundred and fifty-six dollars, as follows: Five hundred dollars each week, after two weeks from the date of said contract, until the said sum should be fully paid. On the same date a bond was executed, as agreed, with Miller and Cook as principals, and respondents, Hatch, Hymers, Marsh, Smith, Clark, and Hoole, as sureties.

It is alleged in the complaint that "the said plaintiff performed each and every of the covenants and stipulations as in the said contract set out, and paid to the said J. H. Miller and Frank Cook the several sums and all the money mentioned in said contract, according to the terms and conditions of the said contract, and at the times therein speci-

fied, except as follows: On or about the —— day of ——, A. D. 187–, and whilst the said Miller and Cook were still engaged in and about the construction of said building, under said contract, the liens hereinafter mentioned were filed in the office of the county recorder of said Ormsby county, after which date the said Miller and Cook, nor either of them, made any demand upon plaintiff, or application for the payment of any further sums of money thereafter accruing upon said contract, or then due thereon, but left the money accruing upon said contract, to wit: the sum of one thousand four hundred and seven dollars and seventy-three cents, in the hands of plaintiff, which sum of money so accruing and remaining in the hands of plaintiff, the plaintiff was at all times ready and willing to pay upon the said contract, according to the stipulations thereof, and which said sum of money not being demanded or called for, the plaintiff applied in part satisfaction of said liens in the manner hereinafter particularly set forth."

It is then alleged that said Cook and Miller did not save and keep plaintiff free or harmless from liens for material and labor upon the said building under the laws of the state, but that, on the contrary, they suffered and permitted two persons named, to acquire, file, and hold liens against said Opera House building for material furnished and used in and about the construction thereof, in the aggregate sum of two thousand eight hundred and seven dollars and seventy-three cents, which said liens were decreed against plaintiff and its said building on the twenty-seventh day of March, 1880, and which said sum, together with necessary costs and attorney's fees, amounting to four hundred and fourteen dollars and eighty-five cents, plaintiff was afterwards compelled to pay, and did pay, less the sum of one thousand four hundred and seven dollars and seventy-three cents, paid out of moneys in plaintiff's hands belonging to said Cook and Miller, and due to them upon said contract, as before stated.

This action is to recover one thousand eight hundred and fourteen dollars and eighty-five cents, which plaintiff was

compelled to pay, and did pay, out of its own separate funds, in order to clear its building of liens.

Respondents, the sureties, alone appeared. They demurred to the complaint as follows, to wit: "That the same does not state facts sufficient to constitute a cause of action against them, or either of them. That it is ambiguous, unintelligible and uncertain in this. That it appears the contract of these defendants was that of suretyship. That it appears that plaintiff agreed to pay the full sum of ten thousand one hundred and fifty-six dollars, in installments of five hundred dollars each week, after two weeks from April, 1878. That it failed to so pay to the contractors said sum, but retained one thousand four hundred and seven dollars and seventy-three cents thereof, in violation of said contract, it appearing that there was no obligation on the part of the contractors to demand the same, and it does not appear that plaintiff ever offered to pay the same, or that these defendants, sureties, ever knew or consented to such violation of the contract. It appears that plaintiff had no right to make the application of the moneys as alleged."

The court sustained the demurrer. Plaintiff refused to amend, and thereupon the court ordered judgment in favor of defendants, the sureties, for their costs. This appeal is from that judgment, and it will be seen that the principal question presented is, whether the application of the fourteen hundred and odd dollars to the satisfaction of the liens, as stated, instead of paying it to the contractors according to the terms of the contract, released the sureties from their obligations upon the bond.

The only alleged violation of the contract by the contractors is in suffering the liens to be filed and foreclosed. The presumption is, therefore, that, in other respects, it was performed according to its terms. It follows that the building was fully completed on or before July 27, 1878. It is not stated when the foreclosure suit was commenced. It only appears that the decree was made March 27, 1880, and that the liens were filed before the building was fully completed, that is to say, before July 27, 1878. Under the

contract all the money was to be paid in five months and one week after about the middle of May, 1878; that is, about the twentieth of October, 1878. After the liens were filed the contractors did not demand, nor did plaintiff pay, or offer to pay, the one thousand four hundred and odd dollars according to the contract, although it was at all times ready and willing to pay the same according to its stipulations. That sum was never paid to the contractors, but it was applied in part satisfaction of the liens, on or after March 27, 1880, the date of the decree of foreclosure.

It must be borne in mind that this appeal is taken from the judgment in favor of the sureties alone, and what follows applies only to their liability. We have nothing to do with the liability of the contractors. It is necessary to settle some matters of a preliminary character before entering upon a discussion of the more important questions presented.

And first, it is claimed that the contract was broken on the part of the contractors by permitting liens to be *filed*, although appellant suffered no damage by the mere filing; that the contract of defendants was to prevent the *filing* of liens. We do not think so. We think it was purely a contract of indemnity. It was "to secure the plaintiff and keep it harmless from all liens and claims of liens." In other words, they agreed that plaintiff should suffer no harm, injury, or damage from any liens or claims of liens. It is not claimed that the *filing* was in any manner injurious. After the filing it may be said there was a *liability* for damage, but the contract did not cover a mere liability. In *Churchill* v. *Hunt*, 3 Denio, 321, it is said that, upon obligations like this, "the right of action becomes complete on the defendant's failure to do the particular thing he agreed to perform." In *Webb* v. *Lansing*, 19 Wend. 424, the covenant was "to indemnify and save harmless the plaintiff *from his liability on said bond and mortgage*, and to pay to him all costs and damages," etc. The court said: "The covenant is not simply to indemnify and save harmless *against the bond*, but it is to indemnify and save harmless the plaintiff from his *liability* on the bond." It was, therefore, held that a

cause of action arose when there was a legal *liability* to suffer damage, and that no actual damage on payment need be shown in order to sustain the action. Upon a similar bond it was so held in *Jones* v. *Childs*, 8 Nev. 125. See, also, *Thompson et al.* v. *Taylor*, 30 Wisc. 69.

We think the contract was not violated by permitting liens to be filed merely. It was broken as soon as plaintiff was in any manner actually damnified by reason of liens or claims of liens.

It is also said that there is no good reason why the sureties should insist upon a strict performance of the contract on the part of appellant, as to the five hundred dollars weekly payments, as a condition precedent to their liability, when their principals, Cook and Miller, defeated a strict performance by their negligence in not calling for payments and by their failing to prevent the filing of liens against the building.

As before stated, Cook and Miller agreed to do three things, and plaintiff agreed to do one. They first undertook to finish the building in the manner specified in the contract, and to secure plaintiff and keep it harmless from all liens and claims of liens. They also agreed to execute and deliver to plaintiff a bond, with sureties, conditioned that they should comply with the contract then made; and in consideration of the stipulations of the contractors, plaintiff agreed to pay Cook and Miller a certain amount of money at certain stated times. The building was finished and the bond was executed according to contract; but after plaintiff's failure to make payments as agreed, the latter suffered damage by reason of compulsory payment and satisfaction of a judgment foreclosing liens from which Cook and Miller undertook to keep them harmless.

It will thus be seen that plaintiff violated its contract as to making payments before there was any breach on the part of the contractors, unless it is true, as claimed by counsel for appellant, that section 10 of the lien law (Stat. 1875, 124) became a part of the bond, and that, under said section, it was plaintiff's right and duty to apply moneys not paid to the contractors in satisfaction of the liens. If we are correct thus far,

it is unnecessary to decide what the result would have been if the contract had been that no liens should be *filed*, or if it had been to the effect that plaintiff should be kept harmless from all *liability* on account of liens and claims of liens; because, under the contract which the bond was given to secure, Cook and Miller did not stipulate that no liens should be *filed*, but only that plaintiff should suffer no damage therefrom. It is not claimed that plaintiff was injured by the *filing*, and it therefore follows that defendants, the sureties, were not derelict in not preventing the same. It also follows that they are not precluded from insisting upon strict performance of the contract upon the part of plaintiff, as a condition precedent to their liability, if such is the law in relation to sureties. Nor is it true, at least as to the sureties, that it was Cook and Miller's duty to demand and call for payments. Plaintiff agreed to pay them weekly, and its duty was to do so or offer to do so. Such payment was the sole consideration of defendants' promises, and its entire burden was upon plaintiff. It was not more the duty of Cook and Miller to demand payment than it was incumbent upon plaintiff to demand of the former that they should finish the building according to the terms of the contract. (Bishop on Contracts, sec. 700; 2 Pars. on Contracts, 636.)

It is next urged that the statute above referred to became as much a part of the contract as it would have been if incorporated in the contract, and that, under the statute, after the liens were *filed* plaintiff had the right to retain any sums of money due to the contractors and apply the same in satisfaction of such liens.

Section 10 of the statute provides that "the contractor shall be entitled to recover, upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and material furnished as aforesaid; and in all cases where a lien shall be filed under this chapter for work done or material furnished to any contractor, he shall defend any action brought thereupon, at his own expense; and *during the pendency of such action* the owner may withhold from the contractor the amount of money for which said lien

is filed; and in case of judgment against the owner or his property upon the lien, the said owner shall be entitled to deduct, from any amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was, originally, the party liable."

It will be noticed that, even as between the plaintiff and Cook and Miller, the statute did not allow any portion of the contract price to be withheld from the contractors until the suit to enforce the liens was pending. But it nowhere appears in the complaint that payments were made according to the contract, up to the time the foreclosure suit was commenced. It does not affirmatively appear, therefore, that, even as to the contractors, plaintiff was justified in withholding any part of the contract price. It may be that it all became due, under the contract, before the suit was pending to enforce the liens. It was all to be paid on or before October 20, 1878, and the decree enforcing the liens, was not rendered until March 27, 1880. Under such circumstances it is not improbable, at least, that the time for payment had expired before the foreclosure suit was pending. Plaintiff having had no right, even as to Cook and Miller, to retain any portion of the contract price until the suit to enforce the liens was pending, and admitting, without deciding, that it had the same right as to the sureties, after the pendency of the suit of foreclosure, it was necessary to allege and prove, in an action against the sureties, as a condition precedent to a right of recovery, that suit was pending before any of the contract price was withheld. After admitting its obligation to make weekly payments, it was incumbent upon plaintiff to justify its failure to do so in order to hold the sureties. It invokes the statute as a justification, but fails to bring itself within its provisions; and the result is the same as though the right to withhold payment at any time had not been given.

In this connection it is proper to consider another point. It is a well-recognized principle that a surety has a right to the benefit of any security which the creditor has taken; and where a creditor has the means of satisfaction in his hands, upon which he has a lien, and which he has the right to appropriate in payment of his demand, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety to that extent will be discharged. Outside of the statute, was it the plaintiff's duty, then, or did it have the right, to retain sufficient of the contract price to satisfy all liens, and if so, when, under the contract, could it be withheld?

We have seen that, under the statute, plaintiff was not authorized to withhold any part of the contract price, until the suit to enforce the liens was pending. It is equally plain that it could not refuse to pay according to the contract, until the contractors were in default. Plaintiff saw fit to promise to pay a certain amount weekly, upon condition that it should be kept harmless from liens, and that a certain bond should be given conditioned as above stated. How, then, could it refuse to pay as agreed, until, at least, some of the conditions of the bond or some term of the contract was broken?

Suppose, after the completion of the building according to the contract, after the liens were filed, but before the pendency of an action for their enforcement, Cook and Miller had brought suit to recover the amount due to them under the contract, and plaintiff had contested the action on the ground that liens had been filed against the building. The court would have said: "The opera house association agreed to pay on certain dates which are past, and Cook and Miller, as yet, have not failed to comply with their contract. At present, the association is in no manner harmed by reason of the liens. The contractors have not yet broken their contract, and until that occurs, payments must be made as agreed." Such being the case, it was not plaintiff's duty to the sureties, or its right, under the contract, outside of the statute, to delay payments, at least until the contract to hold it harmless from liens was broken, which

was not, so far as the complaint shows, until February, 1880. Plaintiff could have limited its obligation to pay, to the condition that no liens should be *filed*, but it did not do so. It was content to do otherwise, and its rights and duties must be tested by the terms of the contract made.

It has been held that, if the maker of a promissory note has funds on general deposit *after the note falls due*, the bank is bound to apply them in payment of the note, or the indorser is discharged. (*McDowell* v. *President, etc., of the Bank of Wilmington*, 1 Harr. (Del.) 369; *Dawson et al.* v. *The Real Estate Bank*, 5 Ark. 284.) Of the correctness of those decisions, we express no opinion. It has, however, never been held that such funds can be so applied until the note is due, or the principal fails to comply with his agreement. Until that time the depositor has full control of his money or credit. So in this case, it can not with any good reason be claimed that, outside of the statute, there was a right, as to the contractors, or that as to the sureties, there was any right or duty, on the part of plaintiff, to delay payment, at least until the contract was broken by the contractors.

But authorities are numerous to the effect that, if plaintiff had paid the contractors according to their agreement, it could have held the sureties, although when the payments were made, suits to enforce liens had been pending, or if, at that time, plaintiff had suffered damage by compulsory satisfaction of liens filed. (*Coombs* v. *Parker et al.*, 17 Ohio, 291; *Perrine* v. *Fireman's Ins. Co.*, 22 Ala. 577; *Sibley* v. *McAllaster*, 8 N. H. 390; *Hunt* v. *Bridgman*, 2 Pick. 583; *Glazier* v. *Douglass*, 32 Conn. 398; *Wright* v. *Simpson*, 6 Ves. Jun. 73; *King* v. *Baldwin*, 17 Johns. 399; *Concord Bank* v. *Rogers*, 16 N. H. 16; *Pittstown* v. *Plattsburg*, 15 Johns. 435; *Ex. of Baker* v. *Marshall et al.*, 16 Vt. 524; *Price* v. *Kirkham*, 3 H. and C., Eng. Exch. 439; *Looney* v. *Hughes*, 26 N. Y. 522.)

We now come to the principal question presented: Did plaintiff's failure to pay the contractors, as agreed, discharge the sureties? Upon similar facts, we answered this question in favor of the sureties, in *Truckee Lodge* v. *Wood*,

14 Nev. 309, and might content ourselves with the conclusion there reached, but shall pursue the inquiry somewhat further. If there is any principle well settled it is that the liability of a surety is not to be extended, by implication, beyond the terms of his contract, which is *strictissimi juris*. "To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by the change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation, and a variation is made, it is fatal." (*Miller* v. *Stewart*, 9 Wheat. 703; *Smith* v. *United States*, 2 Wall. 234.)

And in *Ludlow* v. *Simond*, 2 Cai. Cas. 58, the reason of the rule is thus plainly stated: "This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another, in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance the course of business and commerce would be prodigiously impeded and disturbed. It becomes then excessively important to have the rule established that a surety is never to be implicated beyond his specific engagement. Calculating upon the exact extent of that engagement and having no interest or concern in the subject-matter for which he is surety, he is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency when it shall arise in the time and mode prescribed by the contract. The creditor has no right to increase *his* risk without his consent; and can not, therefore, vary the original contract, for that might vary the risk." And in 2 Am. Lead. Cas. 390, it is said: "It is evident, moreover, that in order to a recovery on a contract by one man, for performance by another, there must not only have been no assent by the plaintiff to the default for which he brings the suit, but he must himself have fulfilled every condition precedent to the right of suit. * * * But this rule is wholly irrespective of the direction taken by

the consideration when executed, and applies with the same force whether the suit be against a principal or guarantor; the only difference being that the principal will be answerable on a new implied contract for whatever he actually receives, whether it be that for which he stipulated or not, while the liability of the guarantor is founded solely on the original agreement, and will not accrue unless that be pursued in every particular. The requisitions of the contract may, no doubt, be waived or varied without impairing or defeating its force or efficacy, but then the waiver by the principal can not bind the guarantor."

In *Bethune* v. *Dozier*, 10 Ga. 240, the court say: "We hold it to be the duty of the obligee to *aver* and *prove* the performance, not substantially, but literally, of the original agreement. It is a condition precedent to his right of recovery." In *Dobbin* v. *Bradley*, 17 Wend. 422, the defendant guaranteed the paper of Smith, to be *made payable at a particular* bank. Smith gave his note to the plaintiffs, in the course of business mentioned in the guaranty, but made it payable generally, or, in other words, *without specifying any place of payment.* And although the note was deposited in the particular bank, before it came to maturity, it was held that the defendant was not liable, and the court refused to go into the inquiry whether the surety had been injured, saying it was enough that the case did not come within the terms of the contract. In *Maynard* v. *Boyd*, 5 Md. 109, the court thus expressed itself: "The indorsement by the defendant of Pyfer's notes to the plaintiff was based upon the security offered by the mortgage, and therefore the mortgage may be regarded as the consideration of the agreement into which the surety entered when he consented to indorse the notes. The terms of the mortgage, therefore, must be strictly complied with by the plaintiff, in order to bind the defendant as indorser. One of these terms is, there shall be no sale of the mortgaged property until default of the principal debtor to pay the notes upon their maturity. We think this part of the contract between the several parties thereto has been departed from in the sale which has taken place under the

circumstances detailed in the evidence. * * * But it may be said that, although this might have been a departure from the strict letter of the contract between the parties; yet it can not be shown that the indorsers were prejudiced thereby, or their liability enlarged. Whether this was or was not the result of the premature sale does not vary the question. Any dealings with the principal debtor by the creditor which amount to a departure from the contract by which the surety is to be bound, and which, by possibility, might materially vary or enlarge the latter's liability without his consent, operates as a discharge of the surety."

So, in the case at bar, the contract to pay weekly, which was the consideration of the promise of the sureties, must have been strictly complied with in order to bind them. We refrain from making other quotations, but, in addition, the following authorities will be found, upon examination, to sustain the views of this court heretofore and now expressed upon the point under consideration: *Grieve* v. *Smith*, 23 U. C. (Q. B.) 27; *Wright* v. *Russel*, 3 Wilson (C. P.) 530; *Myers* v. *Edge*, 7 T. R. 254; *Walrath* v. *Thompson*, 6 Hill, 541; *Whitcher* v. *Hall*, 5 B. & C. 270; *Wright* v. *Johnson*, 8 Wend. 513; *Walsh* v. *Bailie*, 10 Johns. 180.

If we were permitted to make the inquiry we could not know that the sureties were not injured by plaintiff's failure to make the payments as agreed. It may be that Cook and Miller would have been able to satisfy the liens if they had been paid weekly. It may be they required the money in other business operations, and that the loss of it so crippled them that they were unable to perform their agreement. But speculations are useless. The law is so plainly written on this subject that but one conclusion is possible—which is, that by plaintiff's own *laches* the sureties are released.

The judgment of the court below is affirmed.

[No. 1,058.]

M. MEYER, APPELLANT, *v.* VIRGINIA & TRUCKEE RAILROAD COMPANY, RESPONDENT.

DECLARATIONS OF AN AGENT—WHEN INADMISSIBLE IN EVIDENCE.—The declarations of an agent in charge of a station and warehouse belonging to the defendant, at the time the goods of plaintiff and his assignors were burned therein, as to what occasioned the fire: *Held*, upon the facts stated in the opinion, inadmissible in evidence.

INSTRUCTIONS—REFUSAL OF, WHEN WILL BE SUSTAINED.—Where the record on appeal fails to show that an instruction was applicable to the evidence, the action of the court in refusing it will be sustained even if the reason given by the court for its refusal was not sufficient.

IDEM—NOT PERTINENT TO ISSUES.—Instructions that are not pertinent to any issues in the case should be refused, although they embody correct propositions of law in the abstract.

IDEM—REPETITION OF, WHEN NOT PREJUDICIAL.—Plaintiff complained of an instruction given by the court of its own motion: *Held*, that even if it was erroneous it could have done no harm to plaintiff, because it was but a repetition, in substance, of one given at his request.

APPEAL from the District Court of the Third Judicial District, Lyon County.

The facts are stated in the opinion.

Lewis & Deal, for Appellant:

The points and authorities cited by counsel appear in the opinion.

B. C. Whitman, for Respondent.

By the Court, LEONARD, C. J.:

It is alleged in the complaint herein, that on the thirteenth day of September, 1879, the plaintiff and other persons named were the owners of certain personal property of the value of two thousand six hundred and forty-nine dollars and eighty-five cents, which property was, on said day, stored by defendant in its warehouse, at the Mound House, on the line of its road; that the claims for damage of the other parties mentioned were, prior to the commencement of this action, for a valuable consideration paid

by plaintiff, sold, assigned, transferred, and set over to plaintiff; that defendant's locomotives were so imperfectly constructed and so deficient in the usual and ordinary appliances used on locomotives to prevent the escape of fire, sparks, and coals, and said locomotives were so carelessly run and managed by defendant's agents, servants, and employés, that said warehouse was fired and completely destroyed by fire carelessly and negligently dropped and thrown from said locomotives; and all said personal property in the complaint described was destroyed by said fire, whereby plaintiff and the other parties mentioned were damaged in the sum of two thousand six hundred and forty-nine dollars and eighty-five cents.

Defendant answered and admitted that the warehouse and the said property of plaintiff and his assignors were destroyed by fire at the time and place alleged; but, among other things, denied all allegations charging imperfect construction of its engines and deficiency in the usual and ordinary appliances used thereon to prevent the escape of fire, sparks, and coals. It denied all allegations of carelessness or negligence in running or managing its engines, or that the fire was caused by any act or omission of it or any of its agents, employés, or servants; or that plaintiff, or any of his assignors, had been damaged in any sum by reason of any carelessness or negligence of the defendant or any of its agents, servants, or employés. The verdict and judgment were for the defendant. This appeal is taken from an order overruling a motion for new trial and from the judgment.

1. It is urged by appellant that the court erred in refusing to allow witness Burnett to answer the following question, asked for the purpose of showing that defendant's engines fired the warehouse, viz.: "At the time the building was burning, did you make any statement to J. R. Shaw as to what occasioned the fire? If so, what was that statement?" Shaw was one of the owners of goods burned, and one of plaintiff's assignors, and he was also asked to state whether or not Burnett told him, at the time the building was burning, what occasioned the fire, and, if so, what that

statement was. The court refused to permit the witness to answer, and its action in respect to these questions presents an important subject for our consideration. No part of the evidence admitted is set out in the transcript. It is only shown that, at the trial, "each party introduced evidence tending to establish the issues raised by the pleadings;" and it is agreed that, at the time of the fire, Burnett was defendant's agent, having charge of the station and the warehouse burned. In its order overruling the motion for a new trial, the court said: "Burnett's agency was confined to the charge of the station and warehouse; he had no charge over the engines, or any authority to run or manage them. His business, as station and warehouse agent, had no connection with the construction or the management of the engines." There can be no serious difference of opinion in relation to the law of evidence touching the question in hand, but it is oftentimes difficult to apply the law to the facts presented.

Mr. Justice Story thus states the general principle: "Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ.*" (Story on Agency, sec. 134.)

And in *Enos* v. *Tuttle*, 3 Conn. 250, which has since been followed in the same state, and been recognized as sound law by other courts, it said that declarations to become a part of the *res gestæ*, must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction.

In *Franklin Bank* v. *Navigation Co.*, 11 G. & J. 33, the court said: "In general, declarations or statements by third persons are inadmissible; that, however, is not the universal principle, and does not apply to the authorized declarations or representations of an agent. The rule springing from the relation of principal and agent being that the representations or declarations of an agent made in the course

of and accompanying the transaction which is the subject of inquiry, and, acting within the scope and limits of his authority, may be proved. But it does not extend to declarations or statements made after the transaction, though in relation to it; and the principle upon which the declarations or representations of an agent within the scope of his authority, are permitted to be proved is that, such declarations, as well as his acts, are considered and treated as the declarations of his principal. Whatsoever is so done by an agent is done by the principal through him as his mere instrument. So, whatsoever is said by an agent, either in the making a contract for his principal, or at the time and accompanying the performance of an act within the scope of his authority, having relation to, and connected with, and in the course of, the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal, and admissible in evidence; not merely because it is the declaration or admission of an agent, but on the ground that, being made at the time of, and accompanying, the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the *res gestæ*, a part of the contract or transaction, and as binding upon him as if in fact made by himself. But declarations or admissions by an agent, of his own authority, and not accompanying * * * the doing of an act in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon the principal, not being a part of the *res gestæ*, and are not admissible in evidence, but come within the general rule of law excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done; not a part of the transaction, but only statements or admissions respecting it, and if they relate to anything resting within his knowledge material to either party, it must be proved by his testimony, and not by evidence of his mere assertion, which is no proof of it."

From the great number of cases bearing upon this question, but presenting different facts, we refer to the following, which establish the rule as stated above: *Fairlie* v.

Hastings, 10 Ves. Jun. 125; *Kirkstall Brewery Co.* v. *Furness Railway Co.*, 9 Law Rep. Q. B. Cas. 470; *Haynes* v. *Rutter*, 24 Pick. 245; *Ashmore* v. *Penn. S. T. & T. Co.*, 38 N. J. L. 14; *Byers* v. *Fowler*, 14 Ark. 105; *Penn. Railroad Co.* v. *Brooks*, 57 Pa. St. 343; *Magill* v. *Kauffman*, 4 S. & R. 320; *Franklin Bank* v. *Cooper*, 39 Me. 555; *Luby* v. *Hudson River R. Co.*, 17 N. Y. 131; *Runk* v. *Ten Eyck*, 24 N. J. L. 760; *Gerke* v. *Cal. Nav. Co.*, 9 Cal. 256; *Bradford* v. *Haggerthy*, 11 Ala. 701; *Verny* v. *The B. C. R. & M. R. Co.*, 47 Iowa, 551; *Thallhimer* v. *Brinckerhoff*, 4 Wend. 398; *Bank of the Northern Liberties* v. *Davis*, 6 W. & S. 289; *Pemigewassett Bank* v. *Rogers*, 18 N. H. 261; *Maury* v. *Talmadge*, 2 McLean, 159.

It remains to apply the law to the facts as they are presented. There were two important facts which plaintiff was bound to prove, in order to recover. First, that the fire was caused by sparks or coals from the defendant's engines; and second, that their escape from the engines was due to the imperfect construction of the latter, or the careless or negligent management of the same. These were independent, vital issues. The station agent's duties had no connection with either; that is to say, as to the origin of the fire or the negligence charged, he was not the inculpated agent, and no negligence is alleged against the defendant by reason of his failure to use all means in his power to save the goods. The interval of time that elapsed between the escape of the sparks or coals from the engines, and the making of the statement, is not shown. It seems, however, from the form of the question, that it was while the building was burning. The goods may have been destroyed at the time, and, consequently, the entire injury to owners may have been complete when it was made. It may be, therefore, that in any view, the declaration was a mere narration of a past transaction, and that for this reason alone, according to all the authorities, it was inadmissible. But whether it was so or not, a question we do not decide, our opinion and conclusion will be based upon other facts.

For many reasons we are satisfied that Burnett's declaration was inadmissible. Under the circumstances shown

any declaration by him as to the *origin* of the fire could not have been competent testimony, although the fact of *burning*, if that had been in issue, under certain circumstances, might have been proven by the agent's declaration. Under possible conditions a statement by the agent of the fact of burning might have been within the line of his duty, but in the absence of special authority it could not have been any part of his duty, or in his power, to explain how the fire originated. It was Burnett's duty to deliver the goods when they were called for; and if Shaw had not known that they had been burned, or were in such condition that they could not be delivered, and had demanded them, or made inquiries in relation to them which rendered it necessary for Burnett to deliver them, or upon failure to do so, to give a reason for his failure, then any statement as to the cause of the failure, necessary to explain the same, would have been admissible; but the only necessary explanation would have been to the effect that they had been burned. Any statement beyond that fact would not have been required in order that the agent might perform his entire duty to Shaw; and not having been engaged in the performance of any act or duty within the scope of his authority, at the time, he had no implied power to make any statement which the defendant was under no obligation to make.

Any inquiry as to the origin of the fire was of no consequence to Shaw, except as a means of proving one of the essential facts in this case in order to bind the defendant—a fact which the latter was in no manner bound to furnish. A statement as to the origin of the fire did not assist Shaw in obtaining the goods, and it was of no possible benefit, except as a means of establishing defendant's liability as above stated. It was, then, a declaration voluntarily made by Burnett. It was outside of his duty as agent and beyond the scope of his authority. If he had authority to state how the fire originated, under the circumstances shown, he had power, also, to declare that the engines were carelessly managed or improperly constructed. Such declarations would not have been necessary for the proper dis-

charge of his duties to Shaw, and he had no implied authority to make them, and thereby bind the defendant.

This is, perhaps, a sufficient answer to appellant's claim of error upon this point, but there are others, some of which we proceed to state.

It is not shown that Burnett at the time the declaration was made, was engaged in the performance of *any* act or duty imposed upon him by his employment, or that it was made in pursuance of any duty as agent. True, he was agent, and as such, had charge of the station and warehouse; but for aught that appears, *he was doing nothing* as agent, either within or without the line of his duty. He and Shaw may have been standing idly by, or sitting down at a safe distance from the scene of conflagration. The statement may have been a casual remark made by the agent of his own motion, or it may have been made in reply to a question asked by Shaw for the purpose of gratifying his curiosity, or of acquiring information which neither the defendant nor its agent was under any legal or moral obligation to impart. In *Franklin Bank* v. *Steward*, 37 Me. 524, the witness, at the request of Steward, called at the bank and inquired of the cashier if a note, on which Steward was surety, had been paid, and the cashier replied that it had been. Witness communicated the answer to Steward, who then gave up security held by him, and the maker of the note thereafter became insolvent. The court held that it was not the duty of the bank to communicate such information further than it was to be ascertained from its records and papers, and said: "Such communications are matters of courtesy and convenience, not of right. Being no more matters of duty on the part of a bank than on the part of an individual, its cashier can not be considered its official or authorized agent to make them, unless they constitute a part of some transaction performed at the time of making them."

And although in *Hynds* v. *Hays*, *supra*, it was decided that it was a part of the official duty of a bank manager to deliver bills that had been paid, *when called upon so to do;* that his failure to do so when demanded was an *act* for

which the bank was responsible, and that the manager's declarations at the time, in explanation of the failure, was a part of the act, and, consequently, admissible in evidence; still, the court said: "The declarations of an agent made while actually transacting for his principal the business to which the declarations relate are admissible only because they are part of the *res gestæ* and are proper for a correct understanding of the acts. They are said to be verbal acts. But the oral admissions of even a party are often loosely and inconsiderately made, and are then, in the very nature of things, very unreliable evidence, and it is not certain that justice would not often be better attained without them. We do not think it would be wise, at any rate, to extend the rule so as to make evidence of the admissions of the agent when not engaged in the business which the admissions tend to explain. A man does not weigh his own casual observations, and is very liable to be misunderstood. It is enough to hold him responsible for his own words, without also charging him with those of his agent, who is not employed to bind him by utterances, except in connection with business, and while it is being done. (And see *Garth* v. *Howard*, 8 Bing. 453.)

Pool v. *Bridges*, *supra*, was an action of trover against a deputy sheriff who attached wool, etc., as the property of one Scholfield. Plaintiff claimed it, and at the trial a witness was permitted to testify that the plaintiff called on Scholfield about a week before he absconded, to ascertain what progress he made in manufacturing his wool; and that Scholfield then showed him wool, yarn, and bocking, which he said were plaintiff's, and which plaintiff examined; and that the wool, etc., thus shown were the same that were attached by the defendant. Upon these facts the court said: "The property in question is supposed to have been in the possession and under the control of Scholfield. It appears, also, that it was so situated in regard to other property of the same kind belonging to Scholfield himself, or to other persons, that none but Scholfield could distinguish them. *If he had been heard to say that the particular parcel in question belonged to the plaintiff, without being en-*

gaged in any transaction relating to the property, this would be mere declaration and hearsay. But if he was then employed in any act respecting the goods, such as separating different parcels for the purpose of distinguishing what belonged to one person and what to another, what he said while he was doing it would be considered as a part of the transaction, and admissible in evidence. It would be like labeling the goods with the name of the owner, which though in one sense a declaration, yet would be construed an act indicative of proprietorship of the goods." "Declarations standing by themselves are hearsay; there must be some main fact or act, which is itself admissible in evidence." (*Lund* v. *Inhabitants, etc., supra,* and *Mason* v. *Croom,* 24 Ga. 216; *Mateer* v. *Brown,* 1 Cal. 224.)

So in *Baptist Church* v. *Brooklyn Fire Ins. Co.,* 28 N. Y. 160, this language is used by the court: "As principal evidence it was incompetent, being the declaration of a third person, who, though an agent of the defendants, was not then engaged in the performance of any act relating to his agency, so as to bring the case within the rule which allows the declarations of an agent as part of the *res gestæ.*"

Roberts v. *Burks,* 12 Am. Dec. 325, was trover against four defendants. Two of them were the owners of a warehouse, and the other two did business for them as warehouse agents. The only testimony adduced to charge the owners was the acknowledgment of the agents that the goods were in the warehouse, and that they had taken them out and shipped them aboard of a boat belonging to the owners of the warehouse, and at their order, to make up a deficiency in the load. We quote from the opinion: "The principle that the declarations or confessions of an agent, except they be made at the time and compose a part of the acts done by him for his principal within the scope of his authority, can not be given in evidence to charge the principal, is too well settled to need authority to support it. The confessions of the agents in this case do not appear to have been made at the time of doing the acts, nor does it appear that they were executing any authority given them, except by their own declarations. The evidence was, therefore, incompetent as

to the keepers of the warehouse and insufficient to warrant a verdict against them."

But it is urged that the declaration was admissible because it was a part of the agent's right and duty to make it, and, consequently, that he had authority so to do and to bind defendant thereby.

Let us admit that an agent authorized to conduct a business enterprise is to be regarded as empowered to take all steps necessary to carry on the business; that there is an implied authority to do all things necessary for the protection of property intrusted to his keeping, or for fulfilling a duty which he has to perform; that an agent's admissions bind his principal if the former is delegated to conduct business of such a nature that its due and ordinary prosecution requires admissions to be made by him in the exercise of the discretion which it is his duty to use in conducting the business intrusted to him. Still, none of these principles justify the admission of the agent's statement in this case. Burnett had charge of the warehouse and of the goods. Presumably his duty was to protect the goods and deliver them to the owners when demanded, upon payment of charges due; and if for any reason he was unable to deliver them upon demand, it is probably true that a failure to do so would have been an *act*, and that declarations necessary for a proper explanation thereof would have been admissible, if made at the time. But it is not shown that there was a demand or inquiry prior to the statement, or that when the latter was made, any proper explanation was required by Shaw, in order that he might know just how the goods were situated, and that they could not be delivered. It certainly was not the agent's duty to make delivery without request so to do; and it was not his duty to make explanation of the cause of inability to deliver, if Shaw was already aware of it. Until delivery became a duty there was no failure on the agent's part; consequently, there was no act to be qualified or explained, and for this reason the statement was incompetent.

Three cases are cited by appellant in support of the claim that it was the agent's right and duty to state not only that

the goods were burned, but, also, as to the origin of the fire.

The first is *Morse* v. *Conn. River Railroad Co.*, 6 Gray, 450. The case shows that the next morning after a trunk had been lost, in accounting for it, upon inquiry made by the owner, or in his behalf, the conductor or baggage-master told the witness that, the night before, a gentleman stepped up and claimed and took a trunk of the same description. But the same morning, the station agent told the witness that he thought the trunk was carried to Northampton, the night before, with other baggage. At the trial the court refused to allow the facts above stated to be given in evidence. This was held to have been error, and the court said: "It was part of the duty of those agents to deliver the baggage of passengers and to account for the same if missing, provided inquiries for it were made within reasonable time. These declarations were, therefore, made by them as agents of the defendants, within the scope of their agency and while it continued." The distinctions between that case and this are so apparent that comment is unnecessary. For aught that appears, it may have been proven that it was a part of the agent's duty to account for missing baggage. If so, that fact was decisive against the defendants. But at all events, it was his duty to deliver the baggage of passengers when called for, and it is shown that inquiries were made on behalf of the plaintiff in relation to the same. Under such circumstances it may well be said that failure to deliver was an *act*, and that statements made by him explanatory thereof, were a part of the *res gestæ* and admissible. But in the case at bar, as we have seen, it is not shown that Shaw demanded the goods, or expected to receive them, or that the agent was at the time in any manner engaged in the performance of any duty required of him, or that he was empowered to make the declaration, or that it was necessary for the proper discharge of his duties.

The second case is *Burnside* v. *Grand Trunk R. Co.*, 47 N. H. 554, and the principle decided is the same as in the one just referred to. Commenting upon this case in *Packet Co.* v. *Clough*, 20 Wall. 541, the court said: "It simply

decides that the statement of the general freight agent, as to the condition of goods delivered to him for transportation, made while the goods are still in transit, or while the duty of the carrier continues, are admissible in evidence against the company. This was a case of a contract unexecuted, and while it remained unexecuted, the agent had power to vary it; had in fact complete control over it. The transaction was still depending, and the agent was still in the execution of an act which was within the scope of his authority." It was the defendant's duty under a contract to deliver certain bags at Milwaukee, and it was the agent's duty to see that the contract was carried out. The bags were delivered to the agent for transportation in August, 1862, and in April, 1863, plaintiff applied to the agent for information concerning them. The agent told him he had ascertained they were at Sarnia, in defendant's depot, under a large lot of flour. It was plainly within the agent's authority and the line of his duty to find and forward the property at the time the plaintiff applied to him, and his statement explanatory of defendant's failure to comply with its contract was undoubtedly admissible as part of the *res gestæ*.

The third case (*Lane* v. *Railroad Co.*, 112 Mass. 462) is of the same nature, and the principles decided are identical with those enunciated in the sixth of Gray.

The court did not err in rejecting the agent's statement.

2. It is claimed the court erred in refusing to instruct the jury that, if they believed from the evidence, a locomotive engine, properly constructed and skillfully managed, would not set fire to a building near the railroad track, or to inflammable material that could, when set on fire, communicate fire to such building; and that, if they believed from the evidence, plaintiff's property was destroyed by fire or sparks from defendant's engines, without fault or negligence on the part of plaintiff or his assignors, they would find for the plaintiff.

The reason assigned by the court for refusing to give this instruction was, that there was no evidence of any inflammable material that did, or could, if ignited, communicate

fire to the building. There is nothing before us to show there was any evidence that an engine, properly constructed and skillfully managed, would not set fire to a building or to inflammable material along the track. The instruction, therefore, may have been properly refused, even though the reason given by the court was not sufficient. (*Fulton* v. *Day*, 8 Nev. 84.) Every presumption is in favor of the action of the court, and if there was error it must be shown.

3. Appellant objects to the second instruction given for respondent, to the effect that, under the pleadings, the jury should find for the defendant, if they believed from the evidence that its engines were properly constructed and *carefully* run. The point of objection is, that the requirement of *skill* in the management of engines was ignored. We deem it unnecessary to declare whether or not an engine can be *carefully* run or managed, so far as the defendant is concerned, in the absence of *skill* on the part of the engineer. The defendant was not charged with *unskillful* management of the engines. It is only alleged in the complaint that the engines were *carelessly* and *negligently* run and managed. If there is a distinction between carelessly running an engine and unskillfully running it (a question we do not decide), proof of the latter fact was not admissible under the pleadings, and an instruction that the defendant was bound to manage its engines skillfully would have been error. Instructions that are not pertinent to any issues in the cause should be refused, although they embody correct propositions of law in the abstract. (*Conlin* v. *S. F. and S. J. R. R. Co.*, 36 Cal. 410.)

4. Complaint is made because the court instructed the jury that the defendant was required to use the "*best generally known* practical appliances within its reach," to prevent the destruction of the property by fire.

We shall not consider this instruction with a view of ascertaining whether it is or is not correct in principle. The defendant was only charged with negligence in failing to use engines having the *usual and ordinary appliances* for preventing the escape of fire; and at the request of plaintiff, the

court charged the jury that "the defendant was required to use the best known appliances to prevent injury to others from fire, and to employ careful and competent engineers; and a railroad company which fails to use *the best generally known* practical appliances within its reach, to prevent the destruction of property, does not exercise the care of a man of common prudence." The instruction complained of, given by the court of its own motion, even though it was wrong, could have done no harm to plaintiff, because it was but a repetition, in substance, of the one given at his request.

We find no error in the record, and the order and judgment appealed from are affirmed.

[No. 1,057.]

A. D. TREADWAY, RESPONDENT, *v.* JONAS WILDER, APPELLANT.

FINDINGS OF JURY UPON SPECIAL ISSUES—PRESUMPTIONS.—Where an equitable defense is raised and a jury is called "to aid the court in its findings of fact" upon certain special issues stated: *Held*, that it will be inferred that all other questions of fact were reserved for the consideration of the court without the aid of the jury.

PAROL AGREEMENT TO CONVEY LAND—WHEN EVIDENCE TO PROVE IS IRRELEVANT—PURCHASE OF TREES AND SHRUBS.—Defendant sought to prove a parol agreement upon the part of plaintiff to convey certain lands upon the issuance to him of a patent, and, for that purpose, offered to show that while he was in possession of the land the plaintiff purchased from him some fruit-trees and shrubs growing upon the land and caused them to be removed therefrom: *Held*, that this evidence was disconnected with the question relative to the agreement; that it did not tend to establish its existence, and that it was properly refused.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

N. Söderberg, for Appellant:

I. All the essential facts must be found by a special verdict in order to enable the court to give a judgment of law upon the matter in issue. (Proffatt on Jury Trial, secs. 436, 437; *Rex* v. *Plummer*, 12 Mod. 628; *Lodge* v. *Jennings*, Gilbert's Eq. 255.)

Opinion of the Court—Belknap, J.

II. The findings do not support the judgment. The issues made by the answer were material. Upon most of them the findings are silent. (*Davis* v. *Caldwell*, 12 Cal. 125; *Phipps* v. *Harlan*, 53 Id. 83; *Johnson* v. *Squires*, Id. 37; *Shaw* v. *Wandesforde*, Id. 300.)

III. Every error in the court below in the rejection of evidence is *prima facie* an injury, and it rests with the other party clearly to show that no harm could have been or was done by the error. (*Jackson* v. *F. R. Water Co.*, 14 Cal. 18; *Table M. T. Co.* v. *Stranahan*, 20 Id. 198; *Carpentier* v. *Williamson*, 25 Id. 167; *Norwood* v. *Kenfield*, 30 Id. 393.)

IV. The rejected evidence corresponded with the allegations in the answer, and was confined to one of the points in issue. It was the best circumstantial evidence of which the fact in issue was susceptible. It was relevant, for it conduced to the proof of a pertinent hypothesis in the case. Its tendency was to make one of the propositions at issue probable. (1 Best. on Ev. 2; 1 Whart. on Ev., secs. 20, 21, 27, 45; *Ins. Co.* v. *Weide*, 11 Wall. 438.)

A. C. Ellis, for Respondent:

No brief on file.

By the Court, BELKNAP, J.:

This is the fourth appeal in this case. (8 Nev. 91; 9 Id. 67; 12 Id. 108.) The plaintiff acquired the title of the government to the premises on the tenth day of May, 1866. Within five years from this date he brought this action of ejectment. Defendant pleaded an equitable defense, to the effect, that at the time proceedings were instituted by plaintiff to acquire the patent defendant was the owner of the possessory right to the premises and entitled to pre-empt the same; that in consideration of these facts, and of his agreeing to pay plaintiff the proportionate share of the expenses of acquiring title to a tract of land, of which the premises in controversy were parcel, and interposing no objection to the application for patent, plaintiff agreed to convey unto defendant upon the issuance of the patent the premises described in the complaint.

The case turned upon the question whether such an agreement had been made, and a jury to whom the interrogatory was submitted answered in the negative. Other special issues, bearing directly upon the alleged agreement, were submitted, but the court instructed the jury that if they should find that the agreement set up in the answer had not been made, it would be unnecessary to answer other interrogatories. Agreeably to the instruction, the jury found no other fact.

The finding thus made appellant claims is a special verdict of the jury, and as such special verdict is defective in not finding other and further facts sufficient to support the the judgment. The record refutes the theory that the finding of the jury was a special verdict, and shows it to have been a finding upon one particular issue.

A jury was called at appellant's request, not to try generally the facts at issue, but "to aid the court in its findings of fact" upon certain special issues stated. (Transcript, p. 22.) From this language we must infer that the jury were called to determine only those special issues which were submitted to them, and that all other questions of fact were reserved for the consideration of the court, without the aid of the jury.

The other exception arose upon the exclusion of evidence to prove that after plaintiff had obtained the patent, he purchased from the defendant some fruit-trees and shrubs growing upon the land, and caused them to be removed therefrom. The court sustained an objection to the evidence, upon the ground that it was immaterial under the issues. The only question left in the case was the existence or non-existence of the agreement to convey the premises to appellant. If this evidence tended to prove such an agreement, or constituted a link in the chain of proof, it was material, and should have been received. If, however, the fact sought to be proved by the rejected evidence was incapable of affording any reasonable presumption or inference as to the disputed fact, it was properly excluded. We do not think this evidence would have conduced to establish the existence of the agreement in controversy.

The fact of the purchase by plaintiff of trees and shrubs growing upon the land was so completely disconnected from the question relating to the agreement that the jury should not have been allowed to have inferred the existence of one from proof of the other.

Judgment affirmed.

[No. 1,097.]

THE STATE OF NEVADA, EX REL. R. H. SCOTT, *v.* W. A. TROUSDALE, AUDITOR OF HUMBOLDT COUNTY, RESPONDENT.

LONG-TERM COUNTY COMMISSIONERS—SALARY OF REGULATED BY SALARY ACT. The compensation of county commissioners is regulated by the provisions of the salary act. (Stat. 1879, 133.)

IDEM—MILEAGE.—The provision allowing mileage in the former law was intended as a part of the compensation of commissioners for their services. The language of the salary act that the salaries fixed "shall be in full for all services," excludes the idea that the legislature intended to allow the former provision upon that subject to stand.

ACCEPTANCE OF AN OFFICE—NOT A CONTRACT.—No contract is created between the government and the officer by his acceptance of the office.

APPLICATION for mandamus before the Supreme Court.

The facts are stated in the opinion.

M. S. Bonnifield and T. W. W. Davies, for Relator.

No appearance for Respondent.

By the Court, BELKNAP, J.:

At the general election held in November, 1878, relator was elected a county commissioner of the county of Humboldt for the period of four years from the first Monday in January, 1879. He duly qualified, and on the last-named day entered upon the duties of his office, and has ever since continued to perform the same.

At the first meeting of the board of county commissioners in the year 1879, the compensation of its members was fixed at six hundred dollars per annum, payable in

equal quarterly payments of one hundred and fifty dollars. The board allowed relator's claim for services for the quarter year ending June 30, 1881, at the rate then fixed, together with mileage. Afterward the respondent, who is the recorder and *ex officio* the auditor of Humboldt county, refused to allow the same for the reason that the statute under which relator's compensation had been fixed, and which permitted him to receive for his services not exceeding the sum of six hundred dollars per annum, together with mileage (sec. 3086, Comp. Laws), had been repealed by the act of March 11, 1879, commonly known as the salary act. (Stats. 1879, 133.)

This act by its first section provides that "From and after the first Monday in January, 1881, the following named officers of the several named counties in this state shall receive the following annual salaries, which shall be in full for all services, and all *ex officio* services required of them." The succeeding sections are severally devoted to the affairs of each county of the State.

The seventh section provides that each of the commissioners of Humboldt county shall receive the sum of five hundred dollars.

The auditor claims that the compensation of the commissioners is regulated by the provisions of the last-mentioned law, rather than by the law in force at the time the board met in January, 1879, and admits that relator is entitled to one fourth of five hundred dollars for his quarter-year services, ending June 30, 1881, but not to mileage.

The views of the auditor are correct. The language of the first section of the salary act, above quoted, is too plain to admit of construction. If the legislature intended to exclude long-term county commissioners, elected at the election of 1878, from the operations of the general salary law, and to have continued their compensation at the rate theretofore established during the continuance of the term for which they were elected, language expressive of such intention should have been employed.

The law, as it stands upon the statute book, applies to all county officers, irrespective of the time of their election,

and we can not, in defiance of its language, interpolate any exception to its provisions. The provision allowing mileage in the former law was intended as part of the compensation of commissioners for their services. Mileage is not mentioned in the present law, but the language of the first section, providing that the salaries fixed "shall be in full for all services," excludes the idea that the legislature intended to allow the former provision upon that subject to stand.

It is also said that the law of 1879 is obnoxious to the objection that it impairs the obligation of a contract, contrary to the prohibition of the constitution of the United States.

Under analogous facts the same objection was made by the mayor of Philadelphia to an ordinance of the council of that city reducing his salary. The court determined, in accordance with every well-considered case upon the subject, that no contract was created between the government and the officer by his acceptance of the office. The court said: "These services rendered by public officers do not, in this particular" (that of compensation), "partake of the nature of contracts, nor have they the remotest affinity thereto. As to stipulated allowance, the allowance, whether annual, *per diem*, or particular fees for particular services, depends on the will of the law-makers; and this whether it be the legislature of the state or a municipal body empowered to make laws for the government of a corporation. This has been the universal construction. * * *" (*Commonwealth* v. *Bacon*, 6 Serg. & R. 322.)

The subject received a very thorough investigation in the case of *Connor* v. *The City of New York*, 2 Sandf. 355. In that case the compensation of the plaintiff, the clerk of the city and county of New York, was changed by an act of the legislature so as to take effect during his term of office. The court considered that there was no contract, express or implied, between the government and the officer, because there was no agreement that he should fulfill the duties of the office for any specified time, but that he could resign at his pleasure, irrespective of the desire of the government.

In discussing the subject the following language was

employed: "In our opinion a public officer is an agent, elected or appointed to perform certain political duties in the administration of the government. The legislative power prescribes these duties, and gives to the officer such compensation for their discharge as is deemed just. The same sovereign power which prescribes the duties may alter them at pleasure. It may increase them without enhancing the compensation. (*Andrews* v. *The United States*, 2 Story, 202.) In like manner the same power may diminish the compensation without lessening the duties. If the officer receive fees it may abolish some, reduce others, or take away all and compensate him by a salary. His right to the emoluments of the office is held subject to all these modifications. All these consequences flow from the political character of the agency and the supremacy of the government in regulating it for the public good." Following this train of reasoning the court was of opinion that an office created by the constitution, with its term and salary defined, could be terminated by the people in their sovereign capacity by the adoption of a new constitution.

The constitution of the state of New York, like that of the state of Nevada, enumerated certain special cases in which the legislature was forbidden either to increase or diminish the salary during the term for which the officer was elected. This constitutional prohibition was referred to by the court in New York (and it is as applicable here as there) for the purpose of showing that in all other cases the legislature was unrestricted in its authority to change the compensation of officers. (See also *Conner* v. *Mayor etc.*, 5 N. Y. 285; *Denver* v. *Hobart*, 10 Nev. 28.)

Mandamus denied.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA.

JANUARY TERM, 1882.

[No. 1,088.]

C. E. ABBOTT ET AL., APPELLANTS, *v.* A. PRIMEAUX, RESPONDENT.

EJECTMENT—PATENT TO SURFACE GROUND OF MINING CLAIM—WHEN NONSUIT SHOULD NOT BE GRANTED.—Plaintiff claimed title to a town lot under a patent issued for a mining claim embracing the land in controversy. The court granted a nonsuit upon the ground that it had not been alleged or proven that plaintiff required said land or had any use for the same in the working of the mining claim: *Held*, that the patent made out a *prima facie* case for the plaintiff, and that the court erred in granting a nonsuit.

APPEAL from the District Court of the Seventh Judicial District, Elko County.

The facts sufficiently appear in the opinion.

R. R. Bigelow and *G. F. Talbot*, for Appellants:

I. The plaintiffs having shown a patent title from the United States, instead of being nonsuited, were entitled to a judgment in their favor. The plaintiffs were not called on to show that they required said ground, or had any use for the same in working their mining claim. They showed an absolute title to it, and were entitled to its possession, without regard to what use they might put it to afterwards.

A patent imparts absolute verity, only to be questioned in a direct proceeding against it. (*Leese* v. *Clark*, 18 Cal. 573; *Doll* v. *Meador*, 16 Id. 323; *The Eureka case*, 4 Saw. 319.) Producing a patent makes out a *prima facie* case. (*Smith* v. *Athern*, 34 Cal. 511.) A patent conveys the fee to the soil with all its incidents and appurtenances. (*Van Sickle* v. *Haines*, 7 Nev. 249, 261, 283.) And entitles the holder of it to the possession of the land. (*Bagnell* v. *Broderick*, 13 Pet. 450; *Gibson* v. *Chouteau*, 13 Wall. 102; *Moore* v. *Smaw*, 17 Cal. 199, 224, 226.) The grant itself is evidence that every prerequisite to its issuance had been performed. (*Patterson* v. *Winn*, 11 Wheat. 383; *Doll* v. *Meador*, 16 Cal. 325; 3 Wash. Real Property, 193.)

II. The defendant had shown no title to the premises, nor any interest therein that would authorize him to call the true title to his aid, if plaintiffs did not have it. He must do this before he can be permitted to question the patent held by plaintiffs. (*People* v. *Stratton*, 25 Cal. 251; *Doll* v. *Meador*, 16 Id. 324; *Dodge* v. *Perez*, 2 Saw. 654.)

A. W. Fisk, for Respondent:

I. The common law doctrine, that he who possesses the surface of the earth owns all to the center of the earth, is greatly modified as to the rights of miners and others on the public lands. One may be entitled to the occupancy of the surface, another to the veins of mineral running under the said land. (*Bullion M. Co.* v. *Crœsus G. & S. M. Co.*, 2 Nev. 168.)

II. The laws of this state do not recognize the surface ground of a mine as property, *i. e.*, property subject to taxation. (Stat. 1865, 271, sec. 4.)

III. The mine owner is only entitled to the surface ground for working purposes of his mine. The cases cited by the appellant do not apply. They are all in relation to land taken up either for agricultural or town-site purposes.

By the Court, BELKNAP, J.:

In an action of ejectment for a lot of land in the town of Tuscarora, in Elko county, in which the answer admitted

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the possession of the defendant, plaintiffs' evidence showed that they deraigned title through a patent issued to their predecessor in interest by the government of the United States for a mining claim embracing the premises in controversy.

Thereupon plaintiffs rested their case, and the court, upon defendant's motion, nonsuited plaintiffs for the reason "that the evidence showed the ground in dispute to be the surface ground of a mining claim, and that it had not been alleged or proven that the plaintiffs required said ground, or had any use for the same in the working of said mining claim."

From this order and judgment of nonsuit the appeal is taken.

The patent contains no reservation or qualification whatever, but unconditionally conveys the premises to the predecessor in interest of plaintiffs. The title thus presented in connection with the defendant's admitted possession, made a *prima facie* case for plaintiffs. Whatever bearing the question of the necessity of the use of the ground by plaintiffs for the purpose of working their mining claim may have had upon the controversy, depended upon the nature and character of defendant's claim to the premises.

Upon the facts before the district court at the hearing of the motion for nonsuit, it did not appear what the nature of defendant's claim was, whether he had a legal or equitable, or any title, or that he was not a mere trespasser.

Judgment reversed.

[No. 1,091.]

JANE LAKE, RESPONDENT, *v.* M. C. LAKE, APPELLANT.

DIVORCE—APPLICATION FOR COUNSEL FEES—NOTICE MUST BE SERVED UPON ATTORNEY.—In an action for divorce, the notice of application for the allowance of counsel fees must, under the provisions of the statute, be served upon the attorney (if there is one), instead of the party.

IDEM—WHERE NOTICE HAS ACCOMPLISHED ITS PURPOSE, ERROR NOT PREJUDICIAL.—Where a notice served upon the party accomplished its purpose in bringing the attorney into court, and he stated that he was prepared to proceed with the hearing, subject to the objection that the notice was

Argument for Appellant.

not served upon him, and the court ruled that the notice was sufficient: *Held*, that the ruling was technically erroneous, but as it did not prejudice the defendant, the error should be disregarded.

ALLOWANCE OF COUNSEL FEES, WHEN MAY BE MADE.—The power of the court to make an allowance of counsel fees, while the cause is pending, is incident to divorce suits, and may be made as often as the circumstances of the case may require.

IDEM—AFTER DIVORCE IS GRANTED.—Where the wife obtained a decree of divorce, and the court adjudged a large estate, claimed by her as community property, to be the separate property of the husband, and awarded it all to him: *Held*, that the court was justified in making an allowance of counsel fees to enable her to proceed further and contest the question relating to the property, it appearing that such proceedings were contemplated in good faith.

APPEAL—WHEN ALLOWANCE OF COUNSEL FEES WILL BE GRANTED BY THE SUPREME COURT.—Where the husband appeals from an order of the district court allowing counsel fees to the wife, the supreme court has the power to make an allowance of counsel fees to the wife, so as to enable her to appear, by counsel, in the supreme court upon such appeal.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

R. M. Clarke, for Appellant:

I. In all cases where a party has an attorney in the action or proceeding, the service of papers when required shall be on the attorney, instead of the party. (*Griffith* v. *Gruner*, 47 Cal. 644.)

II. The court had before ordered the payment of counsel fee generally in the case, and by such order had compensated the service and exhausted its power. (Divorce Act, sec. 27; 2 Bish. Mar. and Div. 416; *Wilde* v. *Wilde*, 2 Nev. 306.)

III. There was no motion for new trial pending when the order in question was made. The court had lost jurisdiction of the case, and its jurisdiction could only be revived by a motion.

IV. The matter in issue complained of by plaintiff has been determined adversely to her by the court; and to allow her counsel fee to further prosecute it was a gross abuse of discretion. (2 Bish. Mar. and Div., sec. 405–407, 416–417; *Wilde* v. *Wilde*, *supra*.)

V. The plaintiff was, when the order was made, a *feme sole.* She was no longer his wife. As to him she was a stranger in the law, and she was not entitled to call upon his separate estate to clear the expenses of her litigation.

C. S. Varian, for Respondent, cited the following authorities relating to the allowance of counsel fees in actions for divorce. (2 Bish. Mar. and Div., sec. 384 *et seq.*, 421; *Armstrong* v. *Armstrong,* 35 Ill. 114; *Jenkins* v. *Jenkins,* 91 Id. 168–9; *Collins* v. *Collins,* 29 Ga. 518; *Sprayberry* v. *Merk,* 30 Id. 82; *Ex parte King,* 27 Ala. 390; *Phillips* v. *Phillips,* 27 Wisc. 255; *Weishaupt* v. *Weishaupt,* Id. 625; *Moul* v. *Moul,* 30 Id. 203; *Graves* v. *Cole,* 19 Pa. St. 173; *Goldsmith* v. *Goldsmith,* 6 Mich. 286; *Llamosas* v. *Llamosas,* 62 N. Y. 619.)

By the Court, BELKNAP, J.:

In a suit for divorce between the parties hereto, a decree was entered in favor of the plaintiff, dissolving the bonds of matrimony between herself and defendant, and awarding her the custody of their offspring, but adjudging a large estate, claimed by plaintiff as community property, to be the separate property of the defendant husband.

Dissatisfied with the portion of the decree touching the question of property, and desiring to proceed further thereupon, and being destitute of means, the district court ordered defendant to pay plaintiff's attorney for services to be rendered in such further proceedings the sum of six hundred dollars, which amount the court found to be a reasonable and proper fee.

From this order defendant has appealed.

Preliminary to the hearing of the appeal plaintiff has asked this court to make its order directing defendant to pay to her attorney the further sum of two hundred dollars, which amount is admitted to be a reasonable counsel fee for an appeal of this nature. Substantially the same reasons are urged against the allowance of the motion by this court as are urged against the order from which the appeal is taken. The appeal and the motion will, therefore, be considered together.

Opinion of the Court—Belknap, J.

The first question presented relates to the sufficiency of service of the notice of hearing of the application for counsel fees. The service of notice was made upon the defendant, personally, instead of his attorney of record in the suit. The statute relating to marriage and divorce, as amended at the session of the legislature of 1865, provides that the district courts may at any time after the filing of the complaint in a divorce suit, and after "due notice shall have been given to the husband or his attorney," require the husband to pay such sums as may be necessary to enable the wife to carry on or defend the suit, etc. (Comp. L., sec. 220.) Subsequently, and at the session of the legislature of 1869, the present civil practice act became a law. This act, in relation to the service of papers, at section 500 (Comp. L., sec. 1561), provides:

"* * * * But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney, instead of the party. * * *" This latter statute must be construed as regulating the service of notice directed to be made by the statute of 1865. If the party has an attorney in the action, the service must be made upon such attorney, instead of the party. Tested by this requirement, the service of notice in this proceeding was insufficient. The defendant appeared by counsel at the hearing of the motion, and objected thereto, upon the ground of the insufficiency of the service.

It appearing to the court that the defendant had handed the notice to his counsel the day before, the court asked counsel whether he required any additional time to prepare for the hearing. Counsel replied that he did not, and consented that the hearing should proceed subject to his objection touching the service of notice. The court, however, held the service sufficient, and directed the hearing to proceed.

In this ruling the court erred. For the reason stated the service was insufficient, but the ruling was not such error as warrants a reversal of the order appealed from. The object of the notice was to bring the defendant into court at

a time when he, presumably, would be prepared to proceed with the hearing. The notice had the effect of bringing him into court, and when there he stated in substance that he was prepared to proceed with the case. Thus the notice accomplished its purpose. The ruling was technically erroneous, but as it could not have prejudiced the defendant it must be disregarded.

The next objection involves the question of the authority of the court to allow counsel fees in a suit in which an order had previously fixed such fees. The statute provides that the court or judge may, "at any time after the filing of the complaint, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend" the suit, etc.

At common law a wife destitute of means was entitled to an allowance sufficient to enable her to defray her expenses in the suit. The power to make such allowance was considered incident to divorce suits, and the allowance appears to have been made as frequently as circumstances required. In *Graves* v. *Cole*, 19 Pa. St. 173, the supreme court of Pennsylvania, proceeding according to the common law, declared: "The court, having jurisdiction of the suit between the husband and wife, is, from time to time, to make the proper allowance according to the circumstances."

The statute of this state is only affirmatory of the common law. Under a similar statute in the state of New York, Judge Woodruff held, in the progress of the divorce suit of *Forrest* v. *Forrest*, that although "alimony *pendente lite* had once been fixed and allowed to the plaintiff, the amount may be altered and increased, upon its appearing that the necessities of the plaintiff require it, and the amount of defendant's property is such that the increased allowance is reasonable." (5 Bosw. 672; *Morrell* v. *Morrell*, 2 Barb. 480.) The reasonableness of this rule is illustrated by the present case.

At the commencement of this litigation, the court directed defendant to pay plaintiff's counsel a fixed fee, which probably at that time appeared to the court to be a proper fee for the trial of the cause. Afterward the court made a fur-

ther and greater allowance for the same purpose, and finally the court made the order from which this appeal is taken. It would appear from these facts that the controversy has been more protracted and severe than was anticipated when the first allowance was made. In the early stages of the cause it may have been impossible to have approximated the proper amount of money necessary for the expenses of litigation. Justice to both parties, therefore, requires that orders of this nature should be made as demanded by the changing circumstances of the case.

Objections are also made to the order, upon the ground that an allowance for counsel fees to further prosecute a matter which had been determined adversely to plaintiff, was an abuse of discretion in the court, and that no authority existed to make such order after the entry of the decree of divorce and when the parties were no longer husband and wife.

The object of the law is, to afford a wife without means the funds necessary to prosecute or defend suits of this nature. This object would be frustrated, if, after a decree of divorce were rendered, courts should withhold from her the means necessary for a reasonable review of the proceedings. She is entitled to proper allowance so long as the cause is pending and until it is finally determined. (*Forrest* v. *Forrest*, 5 Bosw. 672; *Jenkins* v. *Jenkins*, 91 Ill. 167; *Phillips* v. *Phillips*, 27 Wisc. 252; *Goldsmith* v. *Goldsmith*, 6 Mich. 286.)

Nor did the court abuse its discretion in making the allowance. The fact, that a decree of divorce had passed against the wife, was not considered sufficient ground in the authorities cited to deny an allowance for counsel fees for appeal.

In this case, strong reasons would appear to exist for affording the wife means to take such further proceedings as she may be advised are proper. She had obtained a decree of divorce in her favor, but in the opinion of the district court, the property involved was the separate property of the husband, and for this reason none of it was awarded to her. The importance of the result of this branch of the suit to plaintiff, in connection with the fact that the further

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proceedings appear to have been contemplated in good faith, and not vexatiously, are matters which doubtless addressed themselves to the sound discretion of the court, and justify its action.

No statutory provision authorizes an allowance for counsel fees in this court. But such right has been exercised by courts of similar jurisdiction in conformity with the decisions of the ecclesiastical courts of England. (*Goldsmith* v. *Goldsmith*, and *Phillips* v. *Phillips*, *supra*.) The exercise of such authority is based upon the presumption, that jurisdiction in divorce cases carries with it by implication the incidental power to make such allowances. The power is indispensable to the proper exercise of jurisdiction in guarding the rights of wives.

The order of the district court is affirmed and the motion of respondent allowed.

[No. 1,072.]

JOSEPH MENDES, APPELLANT, *v.* MATTHEW KYLE, RESPONDENT.

FRAUDULENT SALE—INSTRUCTION—WHEN MAY BE MISLEADING.—The court gave an instruction correctly stating the various facts and circumstances that might be considered by the jury in determining whether the sale of personal property was fraudulent; but, after the separate statement of each fact, the court repeated the words: "And the jury are at liberty to find that the sale was fraudulent and find for the defendant: *Held*, that by this repetition the jury may have been misled into the belief that if any of the facts mentioned as tending to prove fraud existed, they would be justified in finding a verdict for defendant independently of the other facts of the case, and that such a construction would be prejudicial to the defendant.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are sufficiently stated in the opinion.

C. J. Lansing and *Bishop & Sabin*, for Appellant.

Thomas Wren and *Crittenden Thornton*, for Respondent.

By the Court, BELKNAP, J.:

This is an action for the recovery of personal property. The respondent justified the taking, as sheriff of the county of Eureka, under certain writs of attachment issued in actions brought against one Frietas. The plaintiff claimed to be the owner of the property by purchase from Gerome, who was the vendee of Frietas. Defendant contended that the sale from Frietas to Gerome was fraudulent as against the attaching creditors, and as plaintiff purchased pending the attachment he was not a *bona fide* purchaser without notice. The case turned upon the *bona fides* of the sale from Frietas to Gerome.

Among other instructions the court gave the following:

"The jury are instructed that in arriving at their verdict as to whether the sale from Frietas to Gerome was fraudulent or not, they are to take into consideration all the facts and circumstances surrounding the alleged sale. If the jury shall find from the testimony that the price alleged to have been paid for the property was much less than it was worth, that is a fact tending to prove that the sale was fraudulent as to the creditors of Frietas, and the jury are at liberty to find that the sale was fraudulent, and find for the defendant.

"If the jury shall find from the testimony that there was no immediate delivery of the property after the alleged sale, that is a fact tending to prove that the sale was fraudulent as to the creditors of Frietas, and the jury are at liberty to find that the sale was fraudulent and find for defendant.

"If the jury shall find from the testimony that Frietas, after the alleged sale, continued to use the property as he had used it before, that is a fact tending to prove that the sale was fraudulent as to the creditors of Frietas, and the jury are at liberty to find that the sale was fraudulent, and find for the defendant.

"If the jury shall find from the testimony that Gerome, after the alleged sale, concealed the fact until Frietas' failure, that is a fact tending to prove that the alleged sale was fraudulent as to Frietas' creditors, and the jury are at lib-

erty to find that the sale was fraudulent, and find for the defendant."

The instruction is correct in stating that inadequacy of consideration, concealment of the sale, and the vendor's applying the property to the same use after as before the sale, were facts tending to prove fraud. The instruction was also correct in directing the jury to take into consideration all of the facts and circumstances of the sale, in determining whether it was fraudulent. But the repetition of the words, "and the jury are at liberty to find that the sale was fraudulent, and find for the defendant," following the separate statement of each fact tending to prove fraud, may have misled the jury. From it they may have understood that if any of the facts mentioned as tending to prove fraud existed, they would be justified in finding a verdict for the defendant, independently of the other facts of the case. The constant repetition of the words last quoted was calculated to make this impression. The proper construction of the charge is, that if any one of the badges of fraud mentioned be established, such fact, in connection with other circumstances of a fraudulent intent on the part of the vendor, is sufficient evidence to support a finding of fraud. But it may have received the other construction, and thereby prejudiced the rights of appellant.

We find no other error in the record.

Judgment reversed.

[No. 1,095.]

THE STATE OF NEVADA EX REL. W. O. SMITH, *v.* FOURTH DISTRICT COURT, RESPONDENT.

JUDGMENT—WHEN, AND HOW, MAY BE SET ASIDE—JURISDICTION—STATUTE.

The manner of vacating judgments is regulated by statute, and the statutory provisions must be complied with, in order to authorize the court to act. The court has no jurisdiction to set aside a judgment upon a mere motion.

CERTIORARI before the Supreme Court.

The facts are stated in the opinion.

C. S. Varian, for Relator.

M. S. Bonnifield and *N. Söderberg*, for Respondent.

By the Court, HAWLEY, J.:

Relator brought suit and obtained judgment in the justice's court against Lowery, Carpenter, and Lovelock on two promissory notes. An appeal was regularly taken to the district court, and the cause was therein tried before a jury, and resulted in a verdict and judgment in favor of relator.

Two days thereafter, Lowery and Carpenter, by their attorneys, served upon relator's attorney the following notice: "You will please take notice, that the defendants, Lowery and Carpenter, will move the court, on the eighth of August, 1881, at the court-room of said court, in the court-house, at ten o'clock A. M., to set aside the judgment rendered in said action, upon the ground that the court had no jurisdiction over the subject-matter of the suit; that the question of the title and right of possession to real property was involved in the action; that plaintiff denied the title and possession of said defendants to the land named in the answer and insisted therein during the trial, and said title and possession were disputed by plaintiff during the whole progress of the case. Defendants will use all the papers filed in the case and the testimony given at the trial and the argument of plaintiff's attorney, on the hearing of said motion."

The court, upon the hearing of said motion, vacated and set aside the judgment previously rendered.

Relator claims that the court, in making said order, exceeded its jurisdiction, and this is the only question to be considered. The power of vacating judgments upon motion is incident to courts of record at common law (*Kemp* v. *Cook*, 18 Md. 138), and such practice prevails in the federal courts. (*Doss* v. *Tyack*, 14 How. 312.) But the manner of vacating judgments in this state is regulated by statute, and we are of opinion that the statutory provisions must be complied with in order to authorize the court to act. Our attention has not been called to any provision of the civil

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practice act that authorizes the court to set aside the judgment in a case like this upon a mere motion. The case does not come within any of the provisions of section 68, and in all other cases the remedy must be as provided for in article 2, section 194 *et seq.*, Stat. 1869, 226, 227, in relation to new trials. (*McKinley* v. *Tuttle*, 34 Cal. 239; *Nuckolls* v. *Irwin*, 2 Neb. 66.) None of these provisions were complied with. We are, therefore, of the opinion that, upon the facts presented by the record, the court exceeded its jurisdiction, and its order setting aside the judgment is hereby annulled.

[No. 1,096.]

THE STATE OF NEVADA EX REL. NEVADA ORPHAN ASYLUM *v.* J. F. HALLOCK, STATE CONTROLLER.

STATE CONTROLLER—DUTIES OF.—It is the duty of the state controller to refuse to draw his warrant for any money that is to be used for unconstitutional purposes.

SECTION 10 OF ARTICLE XI. OF THE CONSTITUTION—MEANING OF "SECTARIAN PURPOSES"—HOW ASCERTAINED—RELIGIOUS SECTS.—For the purpose of ascertaining the meaning of the words "sectarian purposes" as used in the constitution, the court examined the history of the state, in relation to appropriations, as shown by the statutes and legislative journals: *Held*, that the words were used in the popular sense; that a religious sect is a body or number of persons, united in tenets, but constituting a distinct party by holding doctrines different from those of other sects, or people, and that every sect of that character is sectarian within the meaning of that word as used in the constitution.

IDEM—NEVADA ORPHAN ASYLUM—SECTARIAN INSTITUTION.—Upon a review of the testimony: *Held*, that the Nevada Orphan Asylum of Virginia City is a sectarian institution, and as such is prohibited by the constitution from drawing any money from the state treasury to be used for sectarian purposes.

IDEM—MONEY USED FOR SECTARIAN PURPOSES.—*Held*, that if the money claimed, under the act "for the relief of the several orphan asylums of this state" (stat. 1881, 122), should be given to the Nevada orphan asylum, it would be used for the relief and support of a sectarian institution, and in part, at least, for sectarian purposes, and that it is impossible to separate this use of the money from that which might be used for other purposes that are not forbidden.

APPLICATION for mandamus.

Argument for Relator.

The facts are stated in the opinion.

Lewis & Deal and *B. C. Whitman*, for Relator:

I. The state, by the act in question, has offered terms to the orphan asylums in this state, upon which they may receive and provide for orphans, regardless of creed or sect. Upon a compliance with those terms on the part of such asylums, and the performance of all the conditions of the act, the state obligates itself to pay the amounts specified in the act, and has appropriated the necessary funds to make the payments. This is a simple contract, and the petitioner having performed its part, it is the duty of this court to compel the respondent to carry out the contract on the part of the state.

II. The legislature did not impose upon orphan asylums any duty as to the moral and religious training of the orphans provided for. So far as the training of the orphan children as to their duties toward God and toward their fellow-man, the act is silent. That is safely left to the judgment and conscience of the managers of such institutions.

III. The word "sectarian," as used in the constitution, does not prohibit the teaching of any doctrine upon which all Christian denominations agree. So far as the Christian Church is concerned, under the constitution of this state, all denominations of Christians are members of it. They are only called "sectarian" in so far as they differ with each other. As to those general doctrines upon which all agree, they are all orthodox. Christianity is a part of the common law of the state of Nevada, as it is of the United States, in the qualified sense that its divine origin and truth are admitted. (*Vidal* v. *Girard's Ex'rs*, 2 How. 197; Potter's Dwarris, 559; Webster's Works, vol. VI. 175; Story on the Const. sec. 1877.) If the instruction given the Protestant children in religious matters in the Nevada Orphan Asylum is in accordance with those principles in which all Christians believe, how can it be claimed that there has been any violation of the constitution in this respect, the teaching being simply in accordance with the constitution itself?

IV. The religious training occupies but a small portion

of the day. The main purpose of the asylum is to provide for the physical wants of the orphan.

V. Even if the Nevada Orphan Asylum is a sectarian institution, the money asked is not used for sectarian purposes. The money is used to feed the children. It is no more than is sufficient for that purpose, as the testimony shows, and is in fact used for that purpose.

VI. This court can not inquire into the religious belief of the managers of any orphan asylum claiming the benefit of the act of 1881. To do so would be to proscribe citizens on account of their creed. If such inquiry can be made, no orphan asylum could ever derive any benefit from the act except such as should be managed by infidels or persons without any fixed religious belief.

VII. The act being constitutional, it was the duty of the respondent to obey the law and carry it into effect. (Potter's Dwarris on Stats. 202, 203; Sedg. Stat. and Const. Law, 409, 410.)

M. A. Murphy, Attorney General, for Respondent:

I. The Nevada Orphan Asylum of Virginia City is a sectarian institution, owned, controlled, and presided over by a religious organization known as the "Sisters of Charity," all of whom must be Catholics. "Religious orders," the technical name for associations of men or women in the Roman Catholic Church, whose members live in common in convents. The common bond of union among all the religious orders and which distinguishes them from other classes of associations, is retirement from the world, celibacy, and their organization by means of solemn vows into communities of an entirely ecclesiastical character. (14 New Amer. Cyclopædia, 22, title "Religious Orders;" Webster's Dictionary, title "Nun.")

II. The Nevada Orphan Asylum of Virginia City and the school known as the St. Mary's School which is attached thereto, and a part thereof, are sectarian, because those under whose control they are, are Catholics, members of a Catholic order organized by a Catholic priest in the year 1655, which order was confirmed and approved in the year

1660 by the pope, who is the head of the Catholic Church, and they have to report to the mother house. (Zell's Cyclopædia, title "Sisters of Charity;" 4 New Amer. Cyclopædia, 722, title Charity, Sisters of.) The asylum and school are Catholic institutions, presided over by Catholics, and in which are taught and preached the tenets and dogmas of the Roman Catholic religion and church, and the preachers of other denominations have never been permitted to preach therein, and the tenets of other religious denominations have never been permitted to be taught therein.

III. Under the provisions of our constitution neither Christianity nor any other system of religion is a part of the law of this state. We have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance simply because it is religion. (Sedg. on Stat. and Const. Law, 512, 570; Cooley's Const. Lim. 471; *Bloom* v. *Richards*, 2 Ohio St. 387; 1 Kent's Com. 633.)

IV. The framers of our constitution understood the word sectarian to mean all religious denominations. (See Debates in Const. Conv. 561, 578. See, also, *People* v. *Board of Education*, 13 Barb. 400; *St. Patrick Orphan Asylum* v. *Board of Education*, 34 How. Pr. 227; *Jenkins* v. *Andover*, 103 Mass. 94.)

By the Court, LEONARD, C. J.:

This is an application for a writ of mandamus to compel respondent to audit an account for one thousand two hundred and seventy-nine dollars and seventy-nine cents, and to issue his warrant on the state treasurer for the same, in favor of petitioner, the Nevada Orphan Asylum, said account having been apportioned and allowed to petitioner by a majority of the board of asylum commissioners, for the support and maintenance of orphans and half orphans, under and in accordance with the provisions of the statute of this state, entitled, "An act to appropriate funds for the relief of the several orphan asylums of this state, approved March 3, 1881." (See Stat. 1881, 122.)

Respondent refused and refuses to audit said account, or

draw his warrant upon the state treasurer therefor, on the ground that the Nevada Orphan Asylum is a sectarian institution; and that under section 10 of article XI. of the constitution of this state, he is forbidden to audit any account or draw any warrant upon the state treasurer, for the support of any institution of a sectarian character. The section of the constitution referred to reads as follows: "Section X. No public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes."

Respondent admits that the claim of petitioner is valid in every respect, except as above stated, and it is not claimed that the statute referred to is unconstitutional. In short, respondent concedes it to be his duty to audit the account and draw his warrant therefor, if by so doing he would not use the state's money for sectarian purposes; but, on the contrary, he conceives it to be his duty to refuse compliance with petitioner's demand, if, in fact, the Nevada Orphan Asylum is a sectarian institution, notwithstanding the statute.

That the legislature, under the constitution, could not have appropriated moneys for sectarian purposes, is too plain for argument; and it is equally plain that state funds should not, and can not, be used for such purposes in any case, as the statute is written, any more than they could have been so used if the statute had contained a proviso excepting asylums or institutions of a sectarian character. No officer is justified in obeying the letter of a law if in so doing he violates the spirit and letter of the constitution. It was claimed at the oral argument, by counsel for petitioner, that respondent's only power in the premises was to determine whether petitioner is such an asylum as that described in the statute; whether its officers had done the things required of them; whether the board of asylum commissioners had performed their duties, and whether the demand was just as to the amount claimed. It was urged that he had no power to refuse to draw his warrant, although, in fact, by so doing he would be using the funds of the state for sectarian purposes.

As we construe the second brief of counsel for petitioner, this position is abandoned; but whether we are right in this or not, it can not be maintained. The amendment to the constitution above quoted was intended to be self-acting. It requires no legislation to become operative. It is a check upon the financial officers of the state, and the counties and municipalities of the state, and its efficacy is independent of legislative action. The only way to give effect to its provisions is for such officers to refuse to violate its plain commands. (*State ex rel. Salomon & Simpson* v. *Graham*, 23 La. Ann. 407; *Bowie* v. *Lott*, 24 Id. 215; Cooley's Const. Lim. 73.)

The constitutional amendment, adopted subsequent to the enactment of the statute relied on by counsel for petitioner, is controlling upon the point in question, even though the statute itself sustains counsel's position, which we do not now concede. (*Sias* v. *Hallock*, 14 Nev. 332; *State ex rel. Keyser & Elrod* v. *Hallock*, Id. 202; *State ex rel. King* v. *Hallock*, *ante*, 152.) In those cases we recognized the fact that the controller had power, under the statute, to do what he has done in this case under the amended constitution, but the point now being considered was not made by counsel.

Counsel for petitioner next say that petitioner has performed its part of a contract, and the state should now be required to perform the contract on its part. The constitution, as amended, was in force when the statute was passed, and petitioner is presumed to have had knowledge of its provisions. It knew, also, that it could not receive the benefits and privileges of the statute, if such action would violate the constitution. In fact, if payment of petitioner's claim would be using the state's moneys for sectarian purposes, it had no right to suppose that the statute was intended for its benefit.

We now come to the principal question presented:

Is the Nevada Orphan Asylum a sectarian institution, and would the payment of its claim be using the state's funds for sectarian purposes? We agree with counsel for petitioner that this court should not, and will not, consider whether

the statute is wise or unwise, or whether it will or will not diminish the public revenues, but that it will preserve the constitution.

The amendment to the constitution with which we have to deal was proposed by the legislature of 1877. It was agreed to by a majority of the succeeding legislature, in 1879. It was approved and ratified by the people at the election of 1880, when it became a part of the constitution of the state. When the amendment was proposed and ratified, the constitution made it the duty of the legislature to provide for a uniform system of common schools, by which a school should be established and maintained in each school district at least six months in every year; * * * and that any school district which should allow instruction of a sectarian character therein might be deprived of its portion of the interest of the public school fund during the time of such instruction. (Const. art. XI. sec. 2.) Section 9 of the same article also provided that, "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this constitution." Plainly, the object of those provisions was to keep all sectarian instruction from the schools. For some reason the people were not satisfied with the constitution as it was. They demanded something more, and they embodied in the fundamental law a prohibition against the use of the funds of the state or of any county or municipality for sectarian purposes. Two legislatures by their acts declared the amendment a wise and needful measure, and the people at the ballot box adopted as their own the judgment of their legislators. Our constitution can be amended only after a long time and much labor. When an amendment is made it is reasonable to conclude that, in the minds of the people, there is good reason for the change; that it is wise to avoid a possible recurrence of evils borne in the past, or the happening of those which threaten them in the future, or, it may be, both. Constitutions, as well as statutes, are to be construed in the light of previous history and surrounding circumstances. (*Kennedy* v. *Gies*, 25 Mich. 83; Story on the Const., vol. 1, sec. 405 a.)

"The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it.*" (Cooley's Const., Lim. 54.) It is true that, "possible, or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." (Id.) "If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of the object to be accomplished, or the mischief designed to be remedied or guarded against, by the clause in which the ambiguity is met with." * * * "The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision, and it is especially important to look into it, if the constitution is the successor of another, and in the particular in question, essential changes have apparently been made." (Id. 65.)

In this case there is, in one sense, no ambiguity. It is plain that no public funds can be used for sectarian purposes; but it is not plain, from the amendment itself, what the people meant by the words "sectarian purposes." With the view of gathering their meaning, their intention in that respect, and of ascertaining whether this case comes within the constitutional prohibition, we shall examine the history of the state in relation to appropriations, as it is shown by the statutes and legislative journals.

And stating first the result of our investigation, we find that, with one exception, petitioner has been, and is, the only applicant for state aid, where the question of sectarianism could have been raised, since the adoption of the constitution.

The exception stated was this: In 1866 a bill was introduced in the assembly, entitled, "An act appropriating money for the benefit of St. Paul's Episcopal Parish School," at Virginia City. The amount asked was ten thousand dollars. That bill was indefinitely postponed. (Assembly Journal, second session, 276.)

At the same session a bill was introduced in the senate, entitled "An act appropriating moneys for the benefit of the orphan asylum, conducted by the Sisters of Charity at Virginia City." The amount mentioned in the bill was ten thousand dollars. This bill passed both houses, but was vetoed by the governor. (Senate Journal, second session, 252.) It was claimed by the friends of the *senate* bill that the *assembly* bill was introduced for the purpose of defeating the senate bill, and the advocates of the latter bill opposed the passage of the other. (Assembly Journal, 246.)

On the thirteenth of February, 1866, Mr. Lockwood, in the senate, moved to refer the senate bill to a committee, with instruction to amend, by inserting a section as follows: "No sectarian instruction shall be imparted or tolerated in any school or university that may be established or maintained under this act." That amendment was voted down. (Senate Journal, 147.)

The senate committee of ways and means of that session, to whom the above bills were referred, reported against their passage, in part for the following reasons: "They ask for the sum of twenty thousand dollars, substantially for the same objects; that is, to enable them to train up children in the tenets or religious belief of the respective churches, without regard to the question of religious opinions of the relatives of such children, which is commendable zeal for the progress of those denominations, as the right training of the children is the best way to build up churches. But if the state contribute twenty thousand dollars towards building up and strengthening those churches, and making provision thus for future increase of Episcopal pastors and laymen and Catholic priests, nuns, and laymen, other denominations, such as Presbyterians, Methodists, Baptists, and Unitarians, will feel equally entitled to similar appropriations; and thus the revenues of the state might be absorbed to such an extent as to endangor its ability to pay its bonds, interest, and other obligations, for which its faith is already pledged, or which may be necessary for ordinary current expenses."

At the next session of the legislature, an appropriation of

five thousand dollars was made "to provide for fostering and supporting the Nevada Orphan Asylum, a duly incorporated institution, located at Virginia City," and the board of county commissioners of any county in the state was authorized and empowered to send to the asylum any white child or children, under twelve years of age, left parentless while residing in the state. (Stat. 1867, 130.)

At the next session, 1869, a similar law was passed, appropriating six thousand dollars. (Stat. 1869, 107.) At the next session, 1871, the sum of five thousand dollars was appropriated for the same purpose. (Stat. 1871, 103.) At the next session, 1873, an appropriation was sought, and a bill introduced in the assembly to obtain it, but at the request of the sisters in charge, it was withdrawn. (Assembly Journal, sixth session, 225). At the eighth session, 1877, when the amendment to the constitution was proposed, a bill appropriating five thousand dollars was introduced and passed in the senate, but it was defeated in the assembly. (Assembly Journal, eighth session, 244, 327, 330.) At the session of 1879 an appropriation was sought, and a bill therefor introduced, which was laid on the table, where it remained. (Senate Journal, ninth session, 311.)

This, we think, concludes the history in brief, of appropriations made by the state, on behalf of any institutions against which the objection of sectarianism could possibly have been urged, until the passage of the statute under which petitioner claims the amount now demanded. It is proper to state here, that in 1873 "An act for the government of the State Orphans' Home" was passed, the fifth section of which made it the duty of the board of directors to inform the trustees of the Nevada Orphan Asylum that they would receive all orphans in their charge then maintained in any manner by the state, and would bear all the necessary expenses in their removal, at any time when desired by the trustees of said Nevada Orphan Asylum.

A few of the facts above shown will bear repeating. At every session of the legislature from 1866 to 1881, inclusive, with the exception of the session of 1875, petitioner asked for an appropriation from the state. During that time, and

before the amendment was proposed, sixteen thousand dollars were appropriated. At the session of 1877, when the amendment was proposed, an appropriation was asked, but the bill failed to pass. No other institution, save one, of a sectarian character, whether petitioner is so or not, has applied for state aid; and as to that one, the advocates of petitioner's application in the legislature of 1866, charged that its motives were sinister; that its real object in asking an appropriation was to defeat petitioner's application. The friends of petitioner's application in 1866, refused to adopt Mr. Lockwood's amendment that *no sectarian instruction should be imparted or tolerated in school.* If there was no intention of imparting such instruction, it is difficult to perceive what objection could have been made to the amendment offered. It was certainly in keeping with the letter and spirit of the constitution in relation to public schools, and entirely unobjectionable if sectarian instruction was not to be imparted. And one of the sisters in charge testified in this case that, "the same course of treatment has been pursued during the last year as in the years previous thereto." Upon the above facts alone we are strongly impressed with the idea that, in the minds of the people, the use of public funds for the benefit of petitioner and kindred institutions, was an evil which ought to be remedied, and that petitioner's continued applications greatly, if not entirely, impelled the adoption of the constitutional amendment. But we need not rest here. Let us examine the testimony and see where that leads us. There are before us depositions of persons other than the sisters in charge; but we shall confine ourselves to their testimony. They certainly know the facts, and upon their statements alone, outside of what has been already shown, shall it be decided whether or not the Nevada Orphan Asylum is a sectarian institution. It is admitted by the attorney general that petitioner does not make any distinction in its reception of orphans on account of creed or sect, and that it has never made such distinction. It is admitted by counsel for petitioner that the St. Mary's School is a part or branch of the Nevada Orphan Asylum; that it is controlled exclusively by officers of the

latter, who are Sisters of Charity, members of the Roman Catholic Church, and who can not become sisters unless they are members of that church. The petitioner is a branch of the "mother house" at Emmettsburg, Maryland, and has to report to it. The testimony which we are to consider shows this: The amount demanded by petitioner does not exceed the cost of the orphans' living. The books used at the school are those in common use in public schools, and the children are taught in the different branches embraced therein. They are also taught in music, needle-work, housekeeping, etc., when it is proper and best to do so, the principal object being, says sister Frederica, "to make them good women and good mothers afterwards."

All the children, after dressing in the morning, are required to repair to the washroom, when all kneel down in their playroom, where prayers are said aloud by one of them for four or five minutes. This exercise is repeated at night. These prayers are the Lord's prayer, the angelical salutation, the apostolic creed, the acts of faith, hope, and charity, and the prayer for the president. In the act of faith are these words: "*O my God, I firmly believe all the sacred truths Thy holy Catholic Church believes and teaches, because Thou hast revealed them, Who canst neither deceive nor be deceived.*" Protestant children are not required to say those prayers, but they must be present, and, "for form's sake, and the preservation of order, must kneel down during the time occupied in saying them. If objection is made, they need not kneel, but may sit instead. And, as a matter of fact, some do object, and sit, rather than kneel down."

"Only to Catholic children are instructions given in the doctrines of the Catholic Church," and this is done "at the request of their friends." "*The Protestant children are asked to say their prayers in silence to themselves.* If they asked to do otherwise, they would be permitted to do so, but they have never asked it."

"According to the regulations of the organization, should a minister of a denomination other than the Catholic ask to hold services at the orphan asylum, the children of Catholic

parents would be permitted to attend, *provided that his subject would not be on religious matters.*"

"In speaking of religious services held at the asylum," says Sister Vibianna, "I mean exclusively Catholic services. We could permit other religious services to be held, but we have not children enough. We would permit any minister to come down and see children of his own belief. We would give him a room for the purpose of giving them instruction." Sister Frederica says: "I require all orphans and half orphans to attend morning and evening prayer, unless ordered by friends or parents to the contrary. I do not have passages in the Bible read—but they have catechism for the Catholic children every morning. I do not require all to attend to the exercises when the catechism is read. They are present in the room. Any orphan or half-orphan can read any bible, and pray as they wish—*that is, privately. We do not permit it in the room used for prayer.*" * * *

"In regard to religious instructions, we are guided by the instruction of the orphan's friends. We instruct the Cathlic children in the Catholic faith."

From all the preceding facts it seems to us, that but one conclusion can be arrived at, which is, that the Nevada Orphan Asylum is a sectarian institution. Webster defines sectarian as follows: "Pertaining to a sect or sects; peculiar to a sect; bigotedly attached to the tenets and interests of a denomination." He also defines the word as "one of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state," and it was argued by petitioner's counsel that the word was used in this sense in the constitution. We do not think so. It was used in the popular sense. A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is sectarian, and all members thereof are sectarians. The framers of the constitution undoubtedly considered the Roman Catholic a sectarian church.

(Const. Debates, 568 *et seq.*) The people understood it in the same sense when they ratified it.

Counsel for petitioner lay great stress upon what are claimed to be the facts; that is to say, that *Protestant* children are taught only those things which are common to all Christian people, and that only the children of *Catholic* parents are taught the principles of the Catholic Church. In the first place, the facts are not so, and in the second place, if they were, the instruction given to the Catholic children would stamp the institution as sectarian.

The facts are, that all exercises of a religious nature are of one kind, exercises appertaining to the Catholic Church, and they are regular, and form as much a part of the daily routine, as does the study of geography or arithmetic. And those exercises, although brief, are such as leave their impress upon the plastic mind of the child. We refer now to the exercises of a religious nature, in which all take part. The act of faith is repeated by some child, in the presence of all the rest in a kneeling posture, and in doing so he is required to say he believes "all the sacred truths Thy holy Catholic Church believes and teaches, because Thou hast revealed them, Who canst neither deceive nor be deceived." It is idle to say that the kneeling Protestant children are not required to join in those prayers, simply because one child articulates the words for all. Their very posture is a sufficient answer to the proposition. And in addition to these general daily exercises, the children of Catholic parents are taught the catechism, which imparts all the fundamental doctrines of the church.

It does not matter that Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether parents wish it or not. If all the children at the asylum were Catholics, and all their parents or friends wished them taught Catholic dogmas, those facts would not make the institution non-sectarian. *It is what is taught, not who are instructed,* that must determine this question. If the instruction is of a sectarian character,

the school is sectarian. A church is as much sectarian if every person in attendance is a communicant, as it would be if a part were of one belief and the balance of another. The word "sectarian," in the amendment, is evidently used in the same sense as in the original constitution. It was intended that public funds should not be used, directly or indirectly, for the building up of any sect. And any instruction or exercises which, in common schools, would be of sectarian character, are so at the St. Mary's School. Suppose that, in the public schools of Virginia, the teachers should require all the children, twice each day, to go through the religious exercises of the St. Mary's School, would any one, Protestant or Catholic, hesitate to say that sectarian instruction was being imparted? Would any trustee, regardless of his religious faith, after taking an oath to support, protect, and defend the constitution of the state, dare to say it was not being violated each morning and evening? Would any teacher of the Presbyterian faith be permitted to require the whole school to kneel while one should repeat the Catholic article of faith, after substituting "Presbyterian" for the word "Catholic?"

People of nearly all nationalities and many religious beliefs established our state. They met on common ground, and in the most solemn manner agreed that no sect should be supported or built up by the use of public funds. It is a wise provision and must be upheld.

One other question requires consideration. It is claimed that even if petitioner is a sectarian institution wherein sectarianism is taught, still the money now demanded, if paid, would not be used for sectarian purposes, but for the physical necessities of the orphans, and that it is no more than is required therefor.

It can not be doubted, that the appropriation was intended to be a mere charity. The act is entitled, "An act to appropriate funds for the *relief* of the several orphan asylums of this state." All asylums "established on a self-sustaining basis, where the inmates are required to pay for admission, support, and maintenance therein, and such asylums as are now supported entirely by state aid, shall not

Points decided.

be entitled to the benefits of this act, but only such as are supported and sustained wholly or in part by *charitable* donations." (Stat. 1881, 122.) And it is alleged in the petition that petitioner has been, ever since its organization, and still is, almost entirely supported by contributions of money and other assistance from the charitable.

The seventy-five dollars appropriated for each orphan is a contribution only. Should it be given, it would be used for the relief and support of a sectarian institution, and in part, at least, for sectarian purposes. Should it be admitted that it would be used in part for legitimate purposes, still, it is impossible to separate the legitimate use from that which is forbidden.

Mandamus denied.

[No. 1,071.]

JOSEPH MENDES, APPELLANT, *v.* FRANK FREITERS, DEFENDANT, AND HIRAM JOHNSON ET AL., INTERVENORS AND RESPONDENTS.

ATTACHMENT UPON ACCOUNT STATED FOR GREATER AMOUNT THAN IS ACTUALLY DUE—WHEN NOT CONSTRUCTIVE FRAUD—SUBSEQUENT ATTACHING CREDITORS.—When a party acts in good faith, he is not guilty of constructive fraud in commencing an attachment suit upon a stated account for a greater sum than is actually due. His attachment to the extent of the amount actually due to him is valid against subsequent attaching creditors.

AMENDMENT OF COMPLAINT—BETWEEN PARTIES.—As between the plaintiff and the defendant, plaintiff had the right to amend his complaint by adding a count for goods sold and delivered, and money advanced by him to defendant, which included the same items that were embraced in the original complaint upon an "account stated."

MISTAKE IN ORIGINAL COMPLAINT—WHO CAN TAKE ADVANTAGE OF.—If the plaintiff made a mistake in declaring upon an "account stated" instead of for goods sold and delivered, etc., the defendant is the only one that could have taken advantage of the error.

AMENDMENT—EFFECT OF UPON ATTACHMENT—DEFENDANT.—Defendant could not demand a release of the property attached because of the amendment. As to him, plaintiff's lien was in force after as well as before the amendment.

IDEM—INTERVENORS.—An amendment changing the form of action merely, or adding a new count for the same, will not dissolve the attachment as to intervenors.

Argument for Appellant.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

C. J. Lansing and *Bishop & Sabin*, for Appellant:

I. Admitting that the account as stated was for a greater sum than was actually due, parol evidence was admissible to show that the settlement was not made as a final settlement, and was not so considered by the parties at the time it was made, but was approximately correct, and was to be corrected when the true balance was determined.

II. Such an agreement is valid. There is neither actual nor constructive fraud in the transaction. By the terms of the contract, and under said accounting, the true balance due from defendant to plaintiff could be recovered from the defendant, but nothing more.

III. Upon the evidence and the facts in the case, every act of plaintiff was honest and legal, no act of his was fraudulent, nor can it be legally so construed. (*Travis* v. *Epstein*, 1 Nev. 117; *Batterman* v. *Pierce*, 3 Hill, 171.) The original complaint was sufficient to sustain the attachment.

IV. If the case had been tried without the amended complaint, the correct balance due plaintiff could have been proven, notwithstanding the amount fixed and named in the account stated.

V. The complaint being properly amended, the attachment was not rendered nugatory or ineffectual. The attachment was properly issued in the first instance, and is still valid. (*Hathaway* v. *Davis*, 33 Cal. 161.)

VI. The statement of the account in no way affected or impaired the original debt, so long as said statement or writing remained unpaid. (*Brewster* v. *Bours*, 8 Cal. 501; *Cole* v. *Sackett*, 1 Hill, 516.)

VII. The attachment lien of plaintiff could not be postponed to the liens of the intervenors, even if there was partial fraud on the part of the plaintiff. The most that could be done in this way would be to postpone the attachment lien of plaintiff for the amount found to have been fraud-

ulently claimed, after the payment of the true amount found to be due to the plaintiff from the defendant. (*Coghill & Co.* v. *Marks*, 29 Cal. 673; *Patrick* v. *Montader*, 13 Id. 434; *Gamble* v. *Voll*, 15 Id. 509.)

Thomas Wren and *Crittenden Thornton*, for Respondents:

I. The original complaint of plaintiff stated a cause of action which did not exist. There never was an account stated between the plaintiff and the defendant Freiters.

II. The amended complaint does not state facts sufficient to constitute a cause of action. The judgment rendered in favor of plaintiff against the defendant Freiters falls for lack of support by a proper pleading. The intervenors can attack the judgment in this manner. If the plaintiff's judgment is erroneous, and ought to be reversed for error on direct attack, he has no standing in court to assail the judgment which postpones the lien of his attachment to those of the intervenors. If he ought not to have a judgment, he ought not to have a lien by attachment superior to those of the intervenors.

III. An account stated may be opened by either party upon proof of fraud or mistake seasonably discovered. (*Perkins* v. *Hart*, 11 Wheat. 256; *Lockwood* v. *Thorne*, 1 Ker. 170; *Toland* v. *Sprague*, 12 Pet. 300.)

IV. The second count unites an attempt to state a cause of action for goods furnished and delivered, with an attempt to state a cause of action for moneys advanced, paid out, and expended. Such a complaint is bad in substance. (*Buckingham* v. *Waters*, 14 Cal. 147; *Cordier* v. *Schoss*, 18 Id. 580; *Watson* v. *S. F. & H. B. R. R. Co.*, 41 Id. 19.)

V. An attachment upon a cause of action not yet due, or for a sum greater than that actually due, is void against subsequent attaching creditors. (The authorities cited are referred to in the opinion of the court.)

VI. A lien by attachment is good or bad as a whole. It is either wholly good or entirely bad. (*Fairfield* v. *Baldwin*, 12 Pick. 397; *Pierce* v. *Partridge*, 3 Metc. 44; *Wilder* v. *Fondey*, 4 Wend. 104; *Kendall* v. *Lawrence*, 22 Pick. 545.) The point for which we contend has for a century been the

settled doctrine as applicable to contracts of every class within other sections of the statute of frauds. (*Lord Lexington* v. *Clark*, 2 Vent. 223; *Chater* v. *Bickett*, 7 T. R. 201; *Crawford* v. *Morrell*, 8 Johns. 253; *Sherrill* v. *Crosby*, 14 Id. 358; *Movan* v. *Hays*, 1 Johns. Ch. 339; *Botsford* v. *Burr*, 2 Id. 405; *Steere* v. *Steere*, 5 Id. 1; *Fuller* v. *Reed*, 38 Cal. 99.)

VII. No right of action accrues to an accommodation-maker, or indorser, or guarantor, or surety against his principal, until payment in fact of their common obligation. (*Chilton* v. *Whiffin*, 3 Wils. 13; *Goddard* v. *Vanderheyden*, Id. 262; *Young* v. *Hockcliffe*, Id. 346; *Taylor* v. *Higgins*, 3 East, 269; *Maxwell* v. *Jameson*, 2 B. & A. 51; *Tom* v. *Goodrich*, 2 Johns. 213; *Powell* v. *Smith*, 8 Id. 249; *Cumming* v. *Hackley*, Id. 202; *Hoyt* v. *Wilkinson*, 10 Pick. 33; *Morrison* v. *Berkeley*, 7 S. & R. 238; *Miller* v. *Howry*, 2 P. & W. 380; *Hodges* v. *Armstrong*, 2 Dev. 253.)

VIII. The attachment of the plaintiff for the amounts not due was unquestionably voidable by the intervenors as subsequent attaching creditors. The inference of fraud in such a case is not a mere presumption, disputable and inconclusive, but a legal conclusion, incapable of refutation. (*Wilcombe* v. *Dodge*, 3 Cal. 260; *McFarland* v. *Pico*, 8 Id. 626; *Pierce* v. *Jackson*, 6 Mass. 242; *Swift* v. *Crocker*, 21 Pick. 241; *Smith* v. *Gettinger*, 3 Ga. 140; *Hale* v. *Chandler*, 3 Gibbs, 531.)

By the Court, LEONARD, C. J.:

This appeal is from a judgment in favor of the intervenors above named, whereby it was ordered and adjudged that, the lien of plaintiff's attachment upon certain personal property be postponed to the liens of the intervenor's attachment, and that the sheriff should sell said property, and out of the proceeds of such sale pay, first, the judgments of the intervenors against defendant in the order in which they were issued; and, second, out of the surplus, if any, satisfy plaintiff's judgment in whole or part. Plaintiff's attachment was prior in time, and his judgment was for seven thousand nine hundred and fifteen dollars and ninety-

seven cents. The aggregate of intervenors' judgments was three thousand five hundred and eighty-eight dollars and forty-nine cents. The value of the property attached is insufficient to satisfy plaintiff's judgment. The defendant is insolvent, and has no other property out of which the several judgments can be satisfied.

In his original complaint plaintiff declared upon an account stated between him and defendant on the eighth day of August, 1879, and alleged that upon such statement, a balance of ten thousand one hundred and one dollars and ninety-four cents was found due to him from defendant, no portion of which sum had been paid, and asked judgment for that amount. Subsequently defendant filed a demurrer to the complaint, which he afterwards withdrew, and his default was duly entered; but in the meantime the petitions of intervenors had been filed and served. Thereafter, with permission of the court, and without objection on the part of intervenors, plaintiff filed an amended complaint upon an account stated between him and defendant, on said eighth day of August, but alleged that both he and the defendant made a mistake and error as to the amount really due from the latter to him, and that the amount due on said date was seven thousand nine hundred and fifteen dollars and ninety-seven cents, instead of ten thousand one hundred and one dollars and ninety-four cents. And "for further cause of action" he alleged that, "on the eighth day of August, 1879, defendant was, and now is, indebted to plaintiff in the sum of seven thousand nine hundred and fifteen dollars and ninety-seven cents, upon a balance due for goods furnished and delivered, and for moneys advanced, paid out and expended, for defendant, at his special instance and request, between January, 1871, and the eighth day of August, 1879.

The petitions of intervention charged that plaintiff's action was brought, and his attachment issued, to hinder, delay, and defraud the creditors of defendant, by collusion between plaintiff and defendant. Intervenor Colerick also alleged, upon information and belief, that when the action was commenced defendant was not indebted to plaintiff in

any sum; and intervenor Johnson in the same manner alleged that, defendant was not indebted to plaintiff in the sum of ten thousand one hundred and one dollars and ninety-four cents; that, if he was indebted in any sum, it was for several thousand dollars less than that amount, and that he did not know and had no means of knowing or ascertaining the exact amount due, if anything. Plaintiff answered, denying all charges of fraud stated by the intervenors, and made allegations similar to those set out in the amended complaint, as to the amount due to him, and as to the error and mistake in stating that amount, and in commencing the action for a larger sum than was actually due. It will be seen that one of the issues raised between plaintiff and the intervenors was as to the amount actually due to the former from the defendant, and another was upon the alleged fraud. Plaintiff was permitted, without objection on the part of intervenors, to introduce evidence to sustain his allegations in the amended complaint as to the amount actually due, and to repel the charges of fraud. Among other facts, the court found that there was no collusion between plaintiff and defendant, and that plaintiff did not intend to either hinder, delay, or defraud the other creditors of defendant, but that on the evening previous to commencing his action plaintiff demanded an acknowledgment from defendant of the latter's indebtedness, which was given in writing for the sum of ten thousand one hundred and one dollars and ninety-four cents, with the understanding that if said amount was not due, the acknowledgment should be corrected so as to conform to the truth; that when plaintiff took the acknowledgment he did not know exactly how much was due, but did know it was not as much as the sum acknowledged, and that he took it with margin enough in his favor to cover all that defendant owed him, and all that he (plaintiff) had become defendant's surety for; that plaintiff knew at the time he commenced his action for ten thousand one hundred and one dollars and ninety-four cents, that defendant did not owe him that amount, either directly or indirectly, on account of indorsements or otherwise.

As to the execution of the acknowledgment, plaintiff tes-

tified, in substance, that defendant signed it; that they guessed at the amount due; that they did not examine the books; that it was given and received with the understanding that, if there was a mistake, it should be corrected.

As conclusions of law, the court found, 1. That plaintiff was guilty of constructive fraud in taking an acknowledgment for a sum greater than was actually due; 2. That there never was an accounting; 3. That in commencing his action upon an account stated, plaintiff commenced upon a cause of action that did not exist, and that the attachment issued upon said cause of action was invalid and void as to subsequent attaching creditors; and, 4. That plaintiff was entitled to judgment against defendant for the sum of seven thousand nine hundred and fifteen dollars and ninety-seven cents, the amount claimed in the amended complaint. The amount of this judgment was made up of the following items, viz.:

a. There was due to plaintiff, on direct account, five thousand three hundred and sixty-one dollars and eighty-five cents.

b. A note executed for defendant's benefit, upon which plaintiff was joint maker, for one thousand dollars. This note was due when the action was commenced, and according to plaintiff's testimony, it was paid by him before the commencement of the action.

c. A note for six hundred dollars, of like character, not due when the action was commenced, nor when the amended complaint was filed. Plaintiff testified that he paid this note the next day after the attachment.

d. An account against defendant in favor of Dunkel & Co., for which plaintiff was responsible. There is no evidence that this bill has ever been paid.

We deem it unnecessary to decide whether or not the evidence supported an action upon an account stated. The question is, Did the court err in postponing the attachment lien of plaintiff to those of intervenors, and in awarding to the latter priority of payment to the extent of their judgments?

There was a large amount of money actually due to plaintiff, and this action was commenced to recover it, even though

the action was for a larger sum. A cause of action was well stated in the original complaint, whether in fact it existed or not. It was a cause of action upon which an attachment could be had, and the court acquired jurisdiction of the whole subject-matter.

It may be admitted that the pleader first mistook his form of action, but, as between the original parties, it can not be doubted that, upon leave granted, plaintiff had the right to amend as to form merely, by declaring upon the original demand only; or that he could amend by adding a new count upon that demand, setting forth the subject-matter of the original debt, especially where, as in this case, it is apparent upon the face of the amended complaint, that the demand stated in each count is in fact the same. (*Vibband* v. *Roderick*, 51 Barb. 627; *Tierman's Ex.* v. *Woodruff*, 5 McLean, 136.)

The amendment having been rightfully made, it relates back to the commencement of the action, and makes the complaint as if it had been originally drawn as amended. (*Dana* v. *McClure*, 39 Vt. 201; *Ward* v. *Kalbfleish*, 21 How. Pr. 285.)

Again, if the pleader made a mistake in declaring upon an account stated in the original complaint, we are of the opinion that the defendant alone could have taken advantage of the error. (*Moresi* v. *Swift*, 15 Nev. 220; *Patrick* v. *Montader*, 13 Cal. 443.)

In *Ball* v. *Claflin*, 5 Pick. 306, the court said: "But it is said that on the *indebitatus assumpsit*, as for goods sold, the plaintiff could not have prevailed, so that a second attachment would come in. We do not understand that it is the right of third parties, either creditors or bail, to avail themselves of a mere defect in the form of declaring. If it were so, no amendment could be allowed, and the rule would be nugatory. It is to cure defects of form that the statute and the rule were made, and where the plaintiff has the right to the value or the price of goods which have come to the hands of defendant in such a manner as that he is accountable on implied or express contract for the value or the price, the form of the action is wholly unimportant to third

persons, although they may eventually be interested in the suit. There is but one contract, one cause of action, one single matter of the suit. The plaintiff has mistaken the manner of declaring for it. This is the very case where, by virtue of the statute, he is entitled to amend."

It is plain that defendant could not have demanded a release of the property attached because of the amendment, and consequently that, as to him, plaintiff's lien was in force after as well as before the amendment.

The effect of the amendment upon intervenors remains to be considered, and upon this question a fair result of all the authorities is that, an amendment changing the form of the action merely, or substituting or adding a new count for the same, will not dissolve an attachment. (*Laighton* v. *Lord*, 29 N. H. 257; *Austin* v. *Town of Burlington*, 34 Vt. 512; *Hill* v. *Smith*, Id. 541; *Wright* v. *Brownell*, 3 Vt. 440; *Ball* v. *Claflin*, 5 Pick. 304; *Wood* v. *Denny*, 7 Gray, 541; *Seeley* v. *Brown*, 14 Pick. 177; *Page* v. *Jewett*, 46 N. H. 443; *Miller* v. *Clark*, 8 Pick. 413.)

But was plaintiff, under the circumstances shown, guilty of constructive fraud in commencing his action for more than was due? We quote from the court's opinion: "The commencement of the action in the first place for more than thirty-five per cent. more than was due, with knowledge of an excess, in my opinion, amounted to *constructive fraud*, however innocent, or rather, as I think, thoughtless, the act may have been."

The court also held that, "a mistake in seeking to recover more than plaintiff was legally entitled to was no excuse." In considering this question we must keep constantly in mind the fact that, plaintiff was not guilty of *actual* fraud, for so the court found. In other words, he did not intend to recover more than was legally his own. He did not, in fact, intend to hinder, delay, or defraud any other creditor. We must remember, too, that penalties and forfeitures are visited upon fraud and wrongdoing. We freely concede that, if plaintiff had commenced his action for a sum in excess of the amount that he knew was due, with the intention of obtaining judgment for such sum, and satisfying it

out of defendant's property, thus defrauding other creditors, the attachment would have been void *in toto*, and ought to have been postponed to those of intervenors. Counsel for respondent say: "The rule is that an attachment upon a cause of action not yet due, or for a greater sum than is actually due, is void as against subsequent attaching creditors," and *Taaffe* v. *Josephson*, 7 Cal. 352; *McKenty* v. *Gladwin*, 10 Id. 227; *Scales* v. *Scott*, 13 Id. 76; *Wilcoxson* v. *Burton*, 27 Id. 228; *Fairfield* v. *Baldwin*, 12 Pick. 388; and *Pierce* v. *Partridge*, 3 Metc. 44, are relied on in support of the doctrine stated. The first case has been overruled. (See *Patrick* v. *Montader*, 13 Cal. 442, and *Gamble* v. *Voll*, 15 Id. 510, where it is held that "*the mere fact* that the judgment is taken for too much is not itself conclusive proof of fraud.")

As to each case cited wherein the sum sued for was greater than the amount actually due, unless *McKenty* v. *Gladwin* and *Scales* v. *Scott* are exceptions, judgment was knowingly taken for the full amount, after the true indebtedness was ascertained; while in this case, judgment was rendered for no more than the court found was due.

In *Wilcoxson* v. *Burton*, the court found that, the actual indebtedness was nine thousand and odd dollars less than the amount for which the note mentioned in the confession of judgment was given, and that said excess was included in the note for the purpose of defrauding creditors. And the court said: "These facts being given, the judgment is unquestionably void, citing *McKenty* v. *Gladwin* and *Scales* v. *Scott*.

In *Tully* v. *Harloe*, 35 Cal. 308, the court referred to the different California cases above cited, and said: "They merely established the doctrine that, a note or mortgage given for a greater sum than is due, is void in any event, so far as the excess is concerned, and *in toto* unless satisfactorily explained."

In *McKenty* v. *Gladwin*, upon the authority of which the court below particularly relied in rendering the judgment appealed from, the intervenors claimed, and so the court held, that the note in suit was void as to creditors of

the defendant, because a part of its consideration was fraudulent. It was executed on the fifteenth or sixteenth of June, 1857, but antedated to the fourth of June, and by its terms drew interest from date, at the rate of two per cent. per month until paid. The entire consideration for which it was given was composed of eight distinct items, three of which, amounting to twelve thousand dollars, were due July 3, 1857, and the other five were due June 19, 1857, and no portion of those items were drawing interest. The plaintiff testified that he had no other motive for antedating the note than that he should receive interest for the ten days. Upon those facts the court held that, the note itself was entirely void as to creditors, under the statute of frauds, which makes every bond or other evidence of indebtedness, given with the intent to hinder, delay, or defraud creditors, void; evidently upon the familiar doctrine that if a part of an entire contract is void under the statute, it is void *in toto*, and the further doctrine that every man is presumed to know the necessary consequences of his act; and if an act necessarily hinders, delays, or defrauds creditors, then the law presumes it is done with a fraudulent intent.

Upon the same principles was *Scales* v. *Scott* decided. Independent of the question of fraud, the court could not have intended, in McKenty's case, to declare the law to be, "that if there was no consideration for a part of the principal sum for which the note was given, the whole note would be void." (Story on Prom. Notes, sec. 187; *Ayres* v. *Husted*, 15 Conn. 511.) It is evident the court proceeded upon the theory that, the plaintiff *knowingly intended* to accomplish what the law in terms forbade, although he did not know that he could not, legally, take a note bearing interest in substitution for debts that bore none. But in this case, the acknowledgment was given and received with the distinct understanding that all errors should be corrected, and this fact eliminates from the case the element of fraudulent intent in taking it, or of intending to do a forbidden thing, either knowingly or ignorantly. Here, a strict adherence to the entire understanding could defraud no one. There, the result of an enforcement of the con-

tract, according to its terms, must have been to defraud other creditors.

And in the absence of collusion between plaintiff and defendant, the former had good reason to expect, when he commenced his action, that the latter would set up the facts in his answer, and thereby necessitate a fulfillment of the entire agreement, as to correction, or enable him, voluntarily, to do so. Suppose, with the same agreement, without knowing the sum actually due, plaintiff had taken a note for ten thousand dollars, and had brought his action thereon. Would the bringing of such action have been constructive fraud? We think not. *Cushing* v. *Gore*, 15 Mass. 72, was just such a case. There plaintiff had indorsed sundry notes for the defendants. He took Grafton, one of the defendants, to his counting-room to adjust the accounts between them, and to get security for whatever might be due to him. He took from Grafton a note for three thousand dollars, to enable him, by attachment or otherwise, to indemnify himself as indorser, it being understood that he was to take up and discharge the notes indorsed by him as they should become due, and to hold the note then given, as good only for the amount of the others which he should so take up. The amount of the notes so indorsed by plaintiff was not then ascertained; and therefore the new note was given for a sum supposed to be fully sufficient to meet the others. It turned out that plaintiff had indorsed notes amounting to one thousand seven hundred and forty-seven dollars and eighteen cents, which sum, with interest, he claimed on the note in suit.

The court instructed the jury that, "an agreement by the plaintiff to take up and discharge, at his own expense, the notes so indorsed by him when due, was a sufficiently legal consideration for the note in suit, to the extent for which he was liable as indorser, and that it was not necessary that such agreement should have been in writing."

Subsequent to plaintiff's attachment other creditors attached the same goods, upon demands which fell due before either of the notes indorsed by plaintiff became due, and defendants contended that this operated as a fraud upon

other creditors. On this point the judge instructed the jury that the defendants, when they were unable to pay all their debts, might give a preference to any one creditor by paying or giving him security; and that, as they might do this by assigning to plaintiff any of their goods, so they might do it by giving a note, to anticipate the day of payment, and so enable him to attach their goods. The instructions were sustained by the supreme court. We quote from the opinion: "We think when an indorser has, either expressly or impliedly, undertaken to pay the note by him indorsed, there can be no question that such undertaking is a good and valuable consideration for a promissory note. The case finds that, it was understood between Grafton and the plaintiff, that the latter was to pay the notes he had indorsed. There was no direct evidence of this, but the jury have inferred the fact, and they had a lawful right to do so. It might be inferred, we think, from the mere fact of a note having been given with a view to cover those indorsements; and had the plaintiff failed to pay the notes as they became due, so that the defendants had been troubled or put to expense, we see no reason to doubt that they might have maintained an action against them upon an implied promise. * * * Nothing is more common than for debtors, on the eve of failing, to assign property for the security of indorsers * * * and others who are thought to be entitled to favor. Such assignments are held valid here; nor is it an objection that the value of the property assigned exceeds the sum for which the assignee is liable, unless the transaction should appear to be fraudulent. * * * He (plaintiff) has recovered for no more than the amount of the notes indorsed by him, and which he has actually paid. If he had recovered more he might have been charged as trustee for the surplus; or, perhaps, if he had taken judgment knowingly for more than was thus due to him, and had levied his execution for the amount, this might have been evidence of collusion which might avoid his judgment in favor of other creditors." We think the mere bringing of suit upon an account stated for more than is actually due is no more evidence of fraud, actual or constructive, than is the

commencement of an action upon a promissory note when a portion of the consideration has failed, or when there was, in the beginning, a partial want of consideration. We are unable to find a case that holds an attachment void, in the absence of actual fraud, because the action was brought for more than was due, but judgment was taken for no more than the true amount.

There are cases like *Pierce* v. *Jackson*, 6 Mass. 244, where the plaintiff had *no cause of action* when the suit was commenced, which hold that an attempt to thus gain preference is a fraud upon other creditors; and like *Hale* v. *Chandler*, 3 Mich. 532, where plaintiff brought suit upon a note not due, as well as upon an account which was due, for the purpose of making the amount claimed sufficient to give the court jurisdiction, which arrive at the same conclusion. Undoubtedly a plaintiff must have a present cause of action before he can attach. But it would be a startling doctrine to hold, that he must decide at his peril just the amount that the law will give him upon a disputed claim. Neither *Fairfield* v. *Baldwin* nor *Pierce* v. *Partridge*, *supra*, supports the position of respondents' counsel.

As to the first, says the court in *Felton* v. *Wadsworth*, 7 Cush. 589: "That was a case where a judgment was knowingly, deliberately, intentionally, and fraudulently obtained for more than was due, for the purpose of preventing the honest creditors from obtaining their debts out of the effects of their debtor. This fraudulent purpose was followed up by taking out execution and applying the goods or moneys of the debtor to pay this fraudulent execution. * * * The *actual* fraud is the essential element in the case. * * * Nor does it appear that in *Pierce* v. *Partridge* the court intended to extend the principle of the case of *Fairfield* v. *Baldwin*, but, on the contrary, the case of *Pierce* v. *Partridge* is expressly declared to be within the principle of the case of *Fairfield* v. *Baldwin*. Both of these cases, therefore, were decided on the ground of fraud, and it is difficult to see on what other ground a party could be deprived of a just debt."

The whole opinion is instructive in this connection, and in our judgment enunciates the true doctrine.

But it is said by counsel for respondent that a lien by attachment is either good or bad as a whole, while for appellant, it is urged, that his attachment was valid, at least to the amount actually due from defendant to him. We think, in the absence of actual fraud, that appellant's claim is sustained by reason and authority. None of the cases cited by respondent upon this point are opposed to this conclusion, while those in its favor are numerous.

In *Coghill* v. *Marks*, 29 Cal. 677, defendant having failed to answer, plaintiff took judgment for nine hundred and eleven dollars and sixty-four cents. Under the issue taken on intervention, the court found that as to four hundred and sixty-five dollars and eighty-five cents, parcel thereof, the action had been prematurely brought. There was no actual fraud in that particular. Upon those facts the supreme court said: "But the court, instead of reducing the prior lien of the plaintiff to the amount which was due at the date of the attachment, postponed it altogether to the subsequent lien of the intervenor, directing the judgment of the latter to be first paid out of the proceeds of the property, which was erroneous." (See also *Patrick* v. *Montader*, *Tully* v. *Harloe*, and *Felton* v. *Wadsworth*, *supra*.)

Ayres v. *Husted*, 15 Conn. 510, was a contest between attaching creditors of one Crissey. Husted's judgment was rendered upon a note executed by Crissey for one thousand one hundred and twenty-five dollars. The note was given for the purpose of enabling Husted to secure himself by attachment for certain indebtedness due from Crissey and for the indorsement of a note on behalf of Crissey, which was not due. There was no express agreement by Husted to pay the note, or to indemnify Crissey against it. The arrangement between them was made without fraudulent intent.

Said the court: "We think that the judgment is clearly valid, so far as it respects the amount of such indebtedness. The consideration of the judgment is divisible, and that part of it which consists of the debt is easily capable of

ascertainment. The parties to the note are exonerated from any fraudulent intent in the arrangement which led to its execution. That part of the consideration which consists of such debt is sound; and we see no reason why, for that, the note should not be sustained. There is no principle on which a note, the consideration of which consists of claims, some of which are valid and others are invalid, can be held, in the absence of fraud, to be wholly void."

And in *Sanford* v. *Wheeler*, 13 Conn. 165, the same court held that a mortgage executed by the maker to secure an unconditional note, payable on demand, made up of a debt due from the mortgagor, and also of a liability of the mortgagee, as surety, was valid as against the creditors of the latter, for the amount of the debt, although it was set aside for the remainder. (And see *Weeden* v. *Hawes*, 10 Conn. 50; *North* v. *Belden*, 13 Id. 382.)

In *Sanford* v. *Wheeler*, it is said: "The superior court has found that there was no actual fraud in this transaction. The consideration of this note is very distinctly divisible; in part, and to an ascertained amount, it consists of a *bona fide* debt, and in part of mere liabilities. The present applicant appeals to a court of equity against this mortgage. He must come, then, as one disposed to do that justice to his adversary which he demands from him, and this he can not do while he seeks to deprive him of a security for an honest debt; and this court, in the exercise of equitable powers, can give aid to no such attempt. If the facts found in the present case are only such as have a probable tendency to deceive or mislead, without the *malo animo* necessary to constitute actual fraud, they may constitute what is sometimes termed constructive fraud; and then, a court of equity will, if it be practicable, give effect to the security, so far as to permit it to stand in favor of such part, intended to be secured by it, as is unaffected by fraud or other legal infirmity."

Our opinion is, that the court erred in postponing the whole of plaintiff's lien to the liens of intervenors, and in ordering the proceeds of a sale of the property attached accordingly. For the amount actually due to plaintiff, he

Points decided.

ought, in the absence of actual fraud, to receive the preference which the law gives to the first attaching creditor who acts in good faith. Whether or not his lien should have been postponed as to any amount for which he was liable as surety, and which had not been paid, we shall not decide, because it has not been fully discussed; and a decision upon it is not necessary upon this appeal.

In addition to the authorities cited by counsel for respondents, the following may be consulted: *Ayres* v. *Husted*, 15 Conn. 512; *North* v. *Belden*, 13 Id. 376; *Sanford* v. *Wheeler*, Id. 167; *Cushing* v. *Gore*, 15 Mass. 72; *Swift* v. *Crocker*, 21 Pick. 243; *Little* v. *Little*, 13 Id. 426; *Baird* v. *Williams*, 19 Id. 384.

The judgment and order appealed from are reversed.

[No. 1,094.]

THOMAS NASH AND MARY A. KENNEDY, APPELLANTS, *v.* JOHN MULDOON, DEFENDANT, LLOYD HILL ET AL. RESPONDENTS.

TRANSFER OF BIDS—EXECUTION SALE—MONEY RECEIVED BY SHERIFF IN HIS OFFICIAL CAPACITY.—N. and K., as judgment creditors, purchased at sheriff's sale under execution certain cord-wood. No money was paid, each creditor intending that his bid should be credited upon his execution. The sheriff demanded money for his fees, and also for the purpose of paying preferred labor liens upon the property. The creditors, at his suggestion, disposed of their interests to M., and M. thereafter paid the money to the sheriff, who neglected and refused to pay the same, or any part thereof, to the judgment creditors. Evidence relating to this transaction reviewed: *Held*, that the disposal of the interests of the judgment creditors to M. was a transfer of the bids, instead of a sale of the property, and that the sheriff received the money in his official capacity.

LABOR LIENS—COMMENCEMENT OF ACTION—NOTICE.—The sheriff is not justified in paying labor liens before the commencement of an action to enforce them, after notice that the liens are disputed, or when the parties in interest had no notice of the claim of the laborers.

SHERIFF'S EXPENSES IN TAKING CHARGE OF PERSONAL PROPERTY—CERTIFICATE OF DISTRICT JUDGE.—The sheriff is not authorized to withhold money for his expenses incurred in preserving personal property, levied upon, unless his charges have been certified to by the district judge as just and reasonable.

Argument for Appellants.

REFUSAL OF SHERIFF TO PAY MONEY—SECTION 10 OF "ACT RELATING TO SHERIFFS" (STAT. 1861, 104) CONSTRUED—PENALTIES.—The penalties imposed by section 10 of the "act relating to sheriffs" was intended as a punishment for intentional wrongdoing, and are not to be enforced in cases of mistakes, or errors of judgment, made by the officer in good faith.

IDEM—LIABILITY OF SHERIFF AND HIS SURETIES.—The sheriff and his sureties are liable for all moneys received by him in his official capacity, which he neglects or refuses to pay over, on demand, and for the penalalties imposed by the statute when he does not act in good faith.

IDEM—PAYMENT OF MONEY AFTER RETURN DAY OF EXECUTION.—The sheriff and his sureties are liable for all moneys collected by him from the sale of property levied upon before the return day of the writ of execution, notwithstanding intermediate the levy and sale, or payment of the money, the writ may have become *functus officio*.

IDEM—RETURN TO WRIT—NOT NECESSARY TO AUTHORIZE PROCEEDINGS UNDER THE STATUTE.—The return of the sheriff admitting the receipt of the money is not a condition precedent to the institution of proceedings under the provisions of the statute. The receipt of the money may be established by other evidence.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

A. C. Ellis and *W. H. Dickson*, for appellants:

I. The "act relating to sheriffs" (Stat. 1861, 104, sec. 10), is constitutional. It is clearly within the scope of the powers of the legislature to prescribe this practice and proceeding, both as to sheriff and sureties. (*Buckmaster* v. *Drake*, 5 Gil. 321; *Lewis* v. *Garrett*, 5 How. (Miss.) 434; *Lewis* v. *Fellows*, 6 Id. 261; *Earl* v. *Smith*, 26 Tex. 522; *Bell* v. *Thorpe*, 44 Ga. 509; *Milor* v. *Farrelly*, 25 Ark. 353; *Little* v. *Guest*, 30 Tex. 1; *Hall* v. *Commonwealth*, 8 Bush, 378; *Wright* v. *McKenney*, 34 Tex. 568; *Russell* v. *Rolfe*, 50 Ala. 56; *Supervisors* v. *Dunn*, 27 Gratt. 608; *Scogins* v. *Perry*, 46 Tex. 111; *Brown* v. *Commonwealth*, 6 J. J. Marsh. 636; *Koppikus* v. *Cap. Com.*, 16 Cal. 248; Proffat on Jury Trial, sec. 8; *Lake* v. *Tolles*, 8 Nev. 285.)

II. There was no proof which established or tended to establish the validity of any of the so-called labor liens. (*Coscia* v. *Kyle*, 15 Nev. 395.)

III. We deny the validity of the disbursement for alleged advertising, keeper's fees, feeding team, and provisions for

keeper, because the court from which the several writs of attachment and executions were issued did not certify that the same was just and reasonable, as required by law. (*Geil* v. *Stevens*, 48 Cal. 590; *Lane* v. *McElhany*, 49 Id. 421.)

IV. The pleadings and all the testimony show that proper levy of the executions was made, and a sale of the property had before the return day. This shows that the sheriff received the money officially. Even if the levy were made before the actual sale, and the return day intervenes, still he must sell, and the money received from such sale is received officially, and the sureties are liable. (*Evans* v. *Governor*, 18 Ala. 659; *Dennis* v. *Chapman*, 19 Id. 29.)

V. If the money came into the hands of Hill by color of his office, he received it by virtue of his office. And if the parties understood he received it officially it binds the sureties, whether it was received before or after the return-day. As to any distinction between *colore officii* and *virtute officii*. (*Van Pelt* v. *Littler*, 14 Cal. 194; *N. H. S. B.* v. *Varnum*, 1 Metc. 34; *Evans* v. *Governor*, 18 Ala. 659; *Dennis* v. *Chapman*, 19 Id. 29; *Lucas* v. *Locke*, 11 West Va. 81; *Knowlton* v. *Bartlett*, 1 Pick. 271; *McNeary* v. *Marshall*, 7 Humph. 229; *Beale* v. *Commonwealth*, 7 Watts, 183; *Ohio* v. *Sureties Alden*, 12 Ohio, 59; *State Bank* v. *Twitty*, 2 Hawks, N. C., 5.) There can not be any dispute that all the parties understood and treated this money as received officially.

VI. The transfer of the bids of Kennedy and Nash, and the acceptance and recognition of such transfer, binds sheriff and sureties, and this is a proper proceeding. (*Carter* v. *Spencer*, 7 Ired. 14.)

VII. The sheriff wrongfully and willfully withheld this money. He paid the claims of McRae and McLellan, aggregating three hundred and thirty-six dollars, against the protest of petitioners, for which there can be no excuse in fact or in law. We are, therefore, entitled to recover the one thousand nine hundred and eleven dollars, and all the penalties of the statute, and in addition five hundred and eighty-nine dollars and forty cents which he has paid out for illegal labor claims and unauthenticated charges, the respective penalties of ten per cent. per month interest to

commence after the established dates of the demands, and after the receipt of the money.

VIII. The law is not construed as strictly in favor of sureties on official bonds as ordinary sureties. (12 Ohio, 59; 7 Watts, 183.)

Trenmor Coffin, T. D. Edwards, and C. N. Harris, for Respondents:

I. There was no transfer of bids by petitioners, but simply a sale by them of the wood sold at sheriff's sale.

II. If the transactions can be construed into anything else than a sale of the wood, then it must be an attempt on the part of petitioners to control the official action of the sheriff, and having been acted upon by the sheriff, was such an interference and such an unauthorized dealing between the execution creditors and the sheriff as will release the sheriff's bondsmen of all liability as to the results of such unauthorized dealing. (Brandt on Suretyship, secs. 451, 457; *Wells* v. *Gant*, 4 Yerg. 491; *Waters* v. *Carroll*, 9 Id. 102; *Webb* v. *Ansbach*, 3 Ohio St. 522; *People* v. *Pennock*, 60 N. Y. 421; *State* v. *White*, 10 Rich., S. C., 442; *Nolley* v. *Callaway Co.*, 11 Mo. 447; *Carey* v. *State*, 34 Ind. 105; *Scott* v. *State*, 46 Id. 203; *Wilson* v. *Broder*, 10 Cal. 486.)

III. There is nothing in the transcript to show that the two thousand and nine dollars ever came into the sheriff's hands either under color of his office or by virtue of his office. Whatever acts he performed, were simply in the capacity of agent for petitioners. It is an admitted fact that nine hundred and nine dollars of the two thousand and nine dollars came into the hands of Lloyd Hill, the sheriff, long after the return day of the execution. For this amount the sheriff's bondsmen can not be held liable upon any theory of law, as he had no authority to receive the money, and could not receive it officially. (*Thomas* v. *Brawder*, 33 Tex. 783; *Forward* v. *Marsh*, 18 Ala. 645; *Hill* v. *Kemble*, 9 Cal. 71; *Barton* v. *Lockhart*, 2 S. & P., Ala., 109.)

IV. The petitioners in this proceeding have mistaken their remedy; the action should have been for a failure to return. The statute penalties against sheriffs for non-pay-

ment of moneys collected on execution, are only recoverable when the sheriff by his return admits the collection of the money but refuses to pay it over. (Authorities cited in opinion.)

V. It does not appear from the record that any portion of the money received by the sheriff, officially or otherwise, before the return day of the execution, remains in the hands of the sheriff. The utmost that can be claimed is that it has been misapplied. To such a case the statute under which this proceeding is had, does not apply. (*Giffin* v. *Smith*, 2 Nev. 374.)

By the Court, BELKNAP, J.

The plaintiffs having severally obtained judgments against the defendant, thereafter moved in the court below to recover from the sheriff and his sureties the moneys collected under executions issued upon said judgments, together with the penalties imposed by the law for delinquency in such cases. The statute upon the subject reads as follows: "If a sheriff shall neglect or refuse to pay over on demand to the person entitled, any money which may come into his hands by virtue of his office, after deducting his legal fees, the amount thereof, with twenty-five per cent. damages, and interest at the rate of ten per cent. per month from the time of the demand, may be recovered by such person from him and the sureties on his official bond, on application, upon five days' notice to the court in which the action is brought, or the judge thereof in vacation." (Sec. 2961, Comp. L.) The motions were consolidated for the purpose of trial. Judgments were rendered in favor of defendants. It was proven that on the twenty-first day of November, 1879, plaintiffs, Nash and Kennedy, recovered judgments against defendant Muldoon, aggregating the sum of two thousand six hundred and fifty-three dollars and fifty cents. On the fourth day of December following the sheriff sold certain wagons, animals, and hay, under writs of execution issued upon these judgments, and upon said sale received the sum of five hundred and twenty-seven dollars Afterward, and on the twelfth day of June, 1880, under alias ex-

ecutions issued in each case on the second day of June, the sheriff sold a quantity of cordwood, and received therefor the sum of two thousand and nine dollars. Thus, upon the two sales the sheriff received the sum of two thousand five hundred and thirty-six dollars.

It was proven that he had discharged preferred labor liens upon the property to the amount of two hundred and eighty-six dollars and ninety cents, for which he was entitled to credit, and that he was entitled to retain the sum of four hundred and twelve dollars and fifty-five cents, for his fees, commissions, and other expenses. Deducting the aggregate of these amounts, to wit, six hundred and ninety-nine dollars and forty-five cents, from the total amount received, the balance, one thousand eight hundred and thirty-six dollars and fifty-five cents, is the principal sum plaintiffs were entitled to recover.

The sheriff has offered sufficient reasons for failing to pay five hundred and thirty-six dollars and eighty-eight cents of this sum to excuse himself and sureties to this extent from the penalties imposed by the statute; forty-eight dollars and fifty cents of the five hundred and thirty-six dollars and eighty-eight cents is charged by the sheriff as expenses attending the keeping and sale of the property. These items are objected to for the reason that they were not approved by the certificate of the district judge as required by the statute. The law fixes the fees of the sheriff, and also allows him "such further compensation for his trouble and expense in taking possession of property under attachment or execution, or other process, and of preserving the same, as the court from which the writ or order may issue shall certify to be just and reasonable." (Stats. 1875, 148.)

The sheriff also paid the preferred labor liens of McRae for one hundred and fifty-six dollars, of McLennan for one hundred and eighty dollars, of Armstrong for forty-one dollars, and of Burgeoin for one hundred and eleven dollars and thirty-eight cents. The plaintiffs disputed the lien claims of McRae and McLennan, and notified the sheriff not to pay either of them. Nevertheless he did pay them,

notwithstanding no action was commenced to enforce them. Neither of the plaintiffs nor their attorney had any notice of the lien claims of Armstrong or Burgeoin, nor was any action brought to establish either of them. The sheriff clearly erred in paying the liens of McRae and McLennan, nor was he warranted in paying those of Armstrong or Burgeoin. (*Coscia* v. *Kyle*, 15 Nev. 395.) Nor was he entitled to deduct from the moneys due the judgment creditors the expenses incurred in preserving the property levied upon, except such matters as may have been certified by the district judge as having been just and reasonable. (*Geil* v. *Stevens*, 48 Cal. 590; *Lane* v. *McElhany*, 49 Id. 421.)

The payment of the lien claims and the withholding of the charge of forty-eight dollars and fifty cents appear to have been errors of judgment rather than willful or corrupt acts upon the part of the officer, and as the penalties provided by the statute were intended as punishment for intentional wrongdoing, and not for mistakes made in good faith, we are of opinion that whilst plaintiffs are entitled to recover these items no penalty should be imposed for the delinquency. At the sale which took place on the twelfth day of June, the judgment creditors severally purchased cordwood. No money was paid by either of them on account of such purchase, each creditor apparently intending that his bid should be credited upon his execution. The sheriff, however, needed money, not only for his own fees and disbursements, but to discharge labor liens upon the property.

Accordingly he and his deputy demanded payment of money for these purposes, and they suggested that plaintiffs transfer their bids. Negotiations were entered into between the plaintiffs and one Freeman McComber, in which the sheriff and his deputy took an active part. The result of their negotiations is claimed by respondents to have been a sale of the wood by plaintiffs to McComber, whilst appellants claim that it was simply a transfer of their respective bids made at the execution sale.

The distinction to be made is important in view of the payments made by McComber to the sheriff. If it was a sale, respondents claim that the sheriff received the money

as the agent of plaintiffs and not in his official capacity, and the sureties on his official bond are not liable. But we are of the opinion that the view of the appellants upon this question is correct, and that the transaction was a transfer of bids. The testimony of every witness who was interrogated relative to this transaction goes to establish the fact that it was a transfer of bids rather than a sale from plaintiffs to McComber.

Elstner, the deputy sheriff, who had previously told plaintiffs that they must "either pay, sell the wood, or transfer the bids," testified that afterwards McComber came into the sheriff's office and said that the bids had been transferred, and requested him to do the writing, and thereupon he drew the writings which it is claimed show the transaction to have been a sale. The following day McComber paid the sheriff the sum of one thousand one hundred dollars, and the sheriff requested Elstner to write a receipt for the full amount on the "Kennedy and Nash executions." The writing is as follows:

"I have this fifteenth day of June, 1880, by the order of Thomas Nash and Mary A. Kennedy, gave the possession of the wood at the ranch known as John Muldoon's wood ranch to Freeman McComber, and they, the said Kennedy and Nash, transferring their bid and all rights thereto, and directing me as above to do. "LLOYD HILL, Sheriff.

"Per M. R. ELSTNER, Deputy Sheriff."

"Received June 16, 1880, of Freeman McComber, on the above wood, one thousand one hundred dollars. The number of cords estimated in the wood in question above is seven hundred and seventy-seven cords. The remainder of money to be paid to me as soon as the correct number of cords is ascertained. LLOYD HILL, Sheriff.

"Per M. R. ELSTNER, Deputy Sheriff."

Further on Elstner says: "I always understood that the money paid by McComber was paid on these Nash and Kennedy executions, and I so treated it." McComber paid Hill, sheriff, on wood sold on these executions, two thousand and nine dollars in all, and it so appears in the sheriff's docket which I have before me."

The testimony of Nash, Kennedy, and McComber is all to the effect that the transaction was a transfer of bids. McComber says: "The sheriff and the parties interested thought it would save expense if I would step into their shoes and take their bids," instead of having the property resold by the sheriff.

Not only does the testimony of all the witnesses show the transaction to have been intended as a transfer of bids, but the parties so treated it. If the sheriff had considered the transaction a sale he would naturally have credited the executions with the bids made by the plaintiffs; but instead of this, he credited the executions with the payments made by McComber, and so made the entry in his docket.

Until the agreement between McComber and the plaintiffs was reached the sheriff was constantly and earnestly urging a transfer of the bids to some person with funds, to the end that by such an arrangement money would be paid into his hands, to be by him applied to the settlement of the liens, fees, and costs. With this end in view he naturally would not have permitted any sale and delivery of the property by the plaintiffs, for such a proceeding might have defeated his purpose to raise money for the payment of the liens. It is improbable that he would have surrendered the possession of property sold under execution, for which he had received no money, and the proceeds of which sale were subject to the payment of these claims.

Every act of the sheriff is inconsistent with respondents' theory. He received the money paid in by McComber officially, and applied it in part to the payment of the labor liens against the property. If he had received this money unofficially and as plaintiffs' agent, he would not have so treated it.

The writing heretofore mentioned as having been drawn by Mr. Elstner, at the instance of McComber, is as follows: "Lloyd Hill, sheriff: I have, this fifteenth day of June, 1880, sold and transferred all our right, title, and interest to the wood purchased of you at sheriff's sale by me on the twelfth day of June, 1880, at the ranch on the road leading from Carson City to Lake Bigler, and said ranch is known

as the ranch of John Muldoon, to Freeman McComber, who will pay for the same; and the possession of the wood upon our bid is hereby ordered to be given to the said Freeman McComber. THOMAS NASH.

"Witness: E. R. Elrod."

The same notice *mutatis mutandis* was given in the Kennedy case.

These instruments simply recite that the right, title, and interest of the judgment creditors had been sold and transferred. Their "right, title, and interest" was nothing more than an accepted bid. Neither was the owner of the wood, nor could become such until the payment of his bid to the sheriff, nor does the writing purport to recite that the wood itself had been sold. The remaining portion of the document is somewhat ambiguous, but we think it makes the delivery of the wood subject to the payment of the bids to the sheriff. This is the construction it should have received in the light of the oral testimony, and this is the construction the sheriff placed upon it in acting thereunder. Having so treated it he can not now be allowed to justify his delinquency upon the ground that it was an unconditional order.

It is also urged in support of the ruling of the court that of the two thousand and nine dollars paid by McComber, nine hundred and nine dollars came into the hands of the sheriff after the return day of the execution, and that at least for this last named sum the bondsmen can not be holden.

Upon this point the general doctrine is invoked, that the sureties upon the official bond of a sheriff are not liable for money paid to him upon an execution after the day upon which it should have been returned. The reason of this doctrine is said to be that since the sheriff has received the money unofficially he must be proceeded against as any other individual who has received money for the use of another.

But whilst it has been held that a sheriff *eo nominie* is liable for moneys collected by him during the existence of the writ only, it is settled law that he and his sureties are chargeable with moneys collected from the sale of property

levied upon before the return day of the writ, notwithstanding intermediate the levy and sale or payment of the money the writ may have become *functus officio.*

In *Evans et al.* v. *The Governor*, 18 Ala. 663, the court said: "It is well settled that if a sheriff levy on personal property, while the execution is in full force, he may proceed and sell it after the return day of said writ. He acquires by his levy a special property in it, of which he is authorized by law to divest himself by sale. * * * Having the right to sell the property, it would be absurd to say he had no right to receive the money. * * * But for the levy, it is very clear the plaintiff had no right to receive the money after the return day of the execution, and his sureties in such case would not be chargeable for it." (*Rudd et al.* v. *Johnson*, 5 Litt., Ky., 20; *Dennis* v. *Chapman*, 19 Ala. 29; *Beale* v. *Commonwealth*, 7 Watts, 183; *Hamilton* v. *Ward*, 4 Tex. 356.)

The cord-wood having been levied upon and sold prior to the return day of the execution, the respondents are liable for the moneys collected, upon the authorities cited, and the doctrine invoked in their behalf is inapplicable to the facts of this case. No return was made by the sheriff of the executions upon which the money was collected. It is contended that the penalties provided by the statute are recoverable only when the sheriff by his return admits the collection of the money and refuses to pay it over. To sustain this view the following authorities are cited: *Egery* v. *Buchanan*, 5 Cal. 53; *Johnson* v. *Gorham*, 6 Id. 195; *Wilson* v. *Broder*, 10 Id. 486.

The case of *Wilson* v. *Broder* has no bearing upon the point. In the other cases language supporting respondents' view is employed, but an examination of these cases will show that the point in question was in nowise involved in the decision of either of them. In *Egery* v. *Buchanan* the writ had been returned by the officer, and the decision turned upon the question whether his return was traversable in a proceeding by motion under the statute.

The report of the case of *Johnson* v. *Gorham* does not state whether a return to the execution was made, but the

motion was defended upon the ground that the sheriff was unable to determine the conflicting claims to the proceeds of the sale, and he, therefore, asked the advice of the court upon the subject.

No reason has been given, and we think it may confidently be said none exists, for requiring the return of the officer admitting the receipt of the money a condition precedent to the institution of proceedings of this nature. The suggestion is pertinently answered by counsel for appellants, in saying: "Such a construction does violence to the plain letter of the statute, and simply enables a corrupt officer to embezzle moneys or to refuse to pay them over upon request, and to escape all penalty by simply supplementing one offense by another, of failing, as in this case, to make any return."

The evidence adduced at the hearing established the receipt of the money by the sheriff quite as satisfactorily as a return to the execution could have done. Having reached the conclusion that the several positions taken in support of the ruling of the district court are untenable and that the judgment must be reversed, it remains to inquire whether the record discloses error as to defendants Kitzmeyer, Circe, and Rosser. These defendants, who were sureties upon the sheriff's bond, were released therefrom during the month of March, 1880, and before the issuance of the execution under which the two thousand and nine dollars were collected.

Whilst they were sureties only five hundred and twenty-seven dollars were collected, and of this amount four hundred and thirty-nine dollars and fifteen cents were accounted for, leaving a balance unaccounted for of eighty-seven dollars and eighty-eight cents, as appears from the testimony in chief of Mr. Elstner, the deputy sheriff. But the sum of four hundred and thirty-nine dollars and fifteen cents does not embrace all of the charges which the sheriff was entitled to deduct from the total amount collected. It was subsequently proven that the fees, commissions, expenses, etc., of the sheriff in these cases, exclusive of the four hundred and thirty-nine dollars and fifteen cents, amounted

Points decided.

to the sum of four hundred and twelve dollars and fifty-five cents, and of this sum it was not shown how much was incurred whilst the defendants last named were holden upon the bond. *Non constat* that eighty-seven dollars and eighty-five cents of these costs were not incurred prior to the discharge of these three defendants as sureties. At all events, as the sum of four hundred and twelve dollars and fifty-five cents could have been deducted from the amount collected by the sheriff, appellants should have affirmatively shown the amount chargeable whilst the defendants named were sureties.

Having failed to show this fact, we can not say that the court erred in rendering judgment in their favor.

It is ordered that the judgment be reversed as to all of the defendants, except Kitzmeyer, Circe, and Rosser; and that, as to these defendants, the judgment be affirmed.

[No. 1,074.]

GEORGE S. ELDER, RESPONDENT, *v.* J. T. WILLIAMS, APPELLANT.

PROPERTY EXEMPT FROM EXECUTION—TEAMSTER.—The court instructed the jury that, "To be a teamster, within the meaning of the law and of the statute concerning exemptions, a man need not necessarily drive his team. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family—if he has one:" *Held*, correct.

IDEM—SELECTION OF PROPERTY.—The court instructed the jury that, "If a teamster owns more than one team, that is, if he owns more than two horses or mules, and their necessary harness and equipments, and more than one wagon, it is his right and privilege under the law to select and designate two animals and their harness, etc., and one wagon, *suitable for use* therewith, or with two animals, as his exempt property, and when so selected and pointed out, the law will recognize and protect them as his exempt property, provided they were actually in use by such teamster in his business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected:" *Held*, correct.

Argument for Appellant.

FRAUDULENT CONCEALMENT OF OTHER PROPERTY—NOT DEPRIVATION OF RIGHTS UNDER EXEMPTION LAWS.—If plaintiff fraudulently concealed other property and refused to surrender the same in execution, equal in amount to the value of the property claimed as exempt, that fact does not deprive him of an otherwise valid claim of exemption.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

R. M. Clarke, for Appellant-

I. The statute exempting "two horses and a wagon," etc., is not of general and universal, but special and limited application. It does not apply to all persons, but to teamsters only; not even to all teamsters, but to such teamster only as habitually earns his living by using a team. (1 Comp. L. 1282, par. 6.)

II. No person is a teamster within the sense of the law who does not: First, habitually drive a team; and second, by driving a team habitually earn a living. (*Brusie* v. *Griffith*, 34 Cal. 306; *Abercrombie* v. *Alderson*, 9 Ala. 985; *Richie* v. *McCaulay*, 4 Pa. St. 472.) By "teamster" is meant not one who can drive or has driven, but who does drive a team. (Webster's Dict. 1358; 2 Bouv. Law Dict. 572.) The exemption lies in favor of the individual and business, not the individual alone, or the business alone.

III. The statute does not generally or in all cases exempt a team to a teamster but exempts the team by the use of which the teamster habitually earns his living. (*Corp* v. *Griswold*, 27 Iowa, 379.)

IV. It is not two horses and a wagon generally which the law exempts, but the particular two horses and wagon used by the teamster in teaming, and by the use of which in teaming the teamster habitually earns his living. (*Corp* v. *Griswold*, 27 Iowa, 379, 381.) The property must be suitable. (*Ames* v. *Martin*, 6 Wisc. 361; *Favers* v. *Glass*, 22 Ala. 624; *Smith* v. *Gibbs*, 6 Gray, 298.)

V. One who fraudulently conceals or refuses to surrender his property can not claim the benefit of the exemption

law. (*Strouse's Ex'r* v. *Becker*, 38 Pa. St. 190; *Emerson* v. *Smith*, 51 Id. 90; 21 Wend. 68.)

Trenmor Coffin, for Respondent.

I. A fraudulent concealment of property subject to execution is not in prejudice of an otherwise valid claim of exemption. (Thomp. on Homesteads and Ex., secs. 430–436; Smythe on Homesteads and Ex., sec. 432, *et seq.*; *O'Donnell* v. *Segar*, 25 Mich. 376.)

II. The instructions given by the court are according to sound reason and are supported by all the authorities. (*Seamon* v. *Luce*, 23 Barb. 240; *Lockwood* v. *Younglove*, 27 Barb. 505; *Finnin* v. *Malloy*, 33 N. Y. 390; *Borland* v. *O'Neal*, 22 Cal. 504; *Brusie* v. *Griffith*, 34 Cal. 302; Thomp. on Homesteads and Ex., secs. 773, 774; Smythe on Homesteads and Ex., sec. 578.)

III. The statute concerning exemptions must be construed liberally and so as to give effect to its spirit and intention in all cases. (*Bevan* v. *Heyden*, 13 Iowa, 125; *Rogers* v. *Ferguson*, 32 Tex. 534; *Gilman* v. *Williams*, 7 Wisc. 337; *Stewart* v. *Brown*, 37 N. Y. 351.)

By the Court, LEONARD, C. J.:

This action is to recover a wagon and two horses, which defendant, as sheriff, seized under various writs of attachment and execution against the property of plaintiff, and which the latter claims as exempt from levy and sale under execution, for the reason that he is a teamster, and by the use of which he habitually earns his living.

Respondent recovered judgment, and appellant moved for a new trial, on the grounds of errors in law occurring at the trial, excepted to by the defendant, and insufficiency of the evidence to justify the verdict. This appeal is taken from the judgment and from the order denying a new trial. Section 1282 of the compiled laws provides as follows: "The following property shall be exempt from execution, except as herein otherwise specially provided: * * * Sixth—Two oxen, two horses, or two mules and their harness, and one cart or wagon, by the use of which a cartman,

huckster, peddler, teamster or other laborer habitually earns his living."

Counsel for appellant claims that the verdict and judgment and the order denying a new trial are erroneous for the following reasons:

"I. Plaintiff was not a teamster, and, therefore, not entitled to the exemption.

"II. Plaintiff did not habitually earn his living by use of the horses and wagon in question.

"III. The wagon is not a two-horse wagon, or such as is comtemplated by the statute; nor is it adapted to the use which the statute contemplates.

"IV. Plaintiff fraudulently concealed his property and refused to surrender the same in execution."

1. In the statutory sense, is plaintiff a teamster?

It is said that he is not, because he *did not habitually drive* a team, and because he did not earn his living by habitually driving a team.

The court instructed the jury that, "To be a teamster, within the meaning of the law and of the statute concerning exemptions, a man need not necessarily drive his team. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family—if he has one." We think the instruction is correct. In commenting upon this instruction the court said: "One need not hold the reins and guide the team to be a teamster. One who makes his living by teaming, giving his personal attention to it, is a teamster. To hold otherwise is to say that a successful teamster is not entitled to invest his gains and surplus earnings in that business with which he is best acquainted, and thus increase his facilities, without losing the protection otherwise given his original 'plant.'"

In *Brusie* v. *Griffith*, 34 Cal. 306, the court said: "In common speech a teamster is one who drives a team, but in the sense of the statute every one who drives a team is not necessarily a teamster; nor is he necessarily not a teamster,

unless he drives a team continually. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming—that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business habitually, and for the purpose of making a living by that business."

The court's definition of a teamster was correct, and according to that, under the testimony, plaintiff was a teamster.

2. Did plaintiff habitually earn his living by the use of the property in question? It was a part of a large number of horses, harnesses, and wagons which he had for a long time used in teaming, as a teamster, and by which he made his living and that of his family. The court instructed the jury that, "If a teamster owns more than one team, that is, if he owns more than two horses or mules, and their necessary harness and equipments, and more than one wagon, it is his right and privilege under the law to select and designate two animals and their harness, etc., and one wagon, *suitable for use* therewith, or with two animals, as his exempt property, and when so selected and pointed out, the law will recognize and protect them as his exempt property, provided they were actually in use by such teamster in his business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected."

That instruction is absolutely without fault, and under it and the third instruction given for plaintiff, the jury must have found, from the evidence, that he was a teamster at the time of the levy, and that the property in question was in actual use by him in the business by which he earned his living. The testimony is ample to sustain the verdict upon this point. It was just as necessary that plaintiff should be allowed two horses, with their harness, and one wagon, for

the support of his family, as it would have been if he had owned only the exempt property.

The statute exempts *all* the farming utensils or implements of husbandry of the judgment debtor, but only *two* horses or *two* oxen or *two* mules and their harness, and two cows and one cart or wagon, regardless of the number of horses, oxen, etc., that he may have. So it exempts two oxen, two horses, or two mules, and their harness, and one cart or wagon, which he habitually uses in teaming, if by that business he earns his living, regardless of the number that he may have in use. He may select any of the horses so used and any wagon that is suitable for use with them in his business.

3. Was the wagon in question such as is contemplated by the statute? Under the court's instructions, the jury must have found that it was. They were told that the wagon must be suitable for use with the two animals selected. If we admit that there was no conflict of testimony, that the wagon could not, for the reasons given, be profitably employed with the two horses in teaming between Carson and Bodie, still, all or nearly all of the witnesses who testified upon the point, stated that it could be so used in and around Carson; and that by its use, with the two horses, plaintiff could make a living by teaming. We think there is ample testimony to sustain the verdict upon this point.

4. Defendant alleged in his answer that, at the time he levied on the property in question, plaintiff owned and had, and now owns and has, in his possession and control other property subject to attachment and execution, which he wrongfully and fraudulently failed and fails to produce in lieu of the property in dispute; that during all the times mentioned in his complaint, plaintiff has fraudulently concealed and retained, and still conceals and retains, wrongfully and fraudulently, a large amount of property subject to attachment and execution, for the purpose of hindering, delaying, and defrauding *bona fide* creditors; and that defendant knew of said fraudulent conduct when plaintiff demanded the property in question, and when he levied upon it. This portion of the answer was demurred to by plaint-

iff, and the demurrer was sustained on the grounds, first, that the attempted allegations of fraud were entirely insufficient, for the reason that there were no allegations of fact, and that no description of property so concealed was attempted; and second, that a fraudulent concealment of property subject to execution is not in prejudice of an otherwise valid claim of exemption. At the trial defendant offered to prove that, shortly before his failure, plaintiff gave to a party in Bodie his promissory note for several thousand dollars, in excess of what he owed, for the purpose of defrauding his creditors; and that for the same purpose, shortly after his failure, he sold about four thousand dollars worth of hay, his own property, in this state; took the money realized from the sale to Bodie, California, buried it in the ground, and never delivered up any part of it to his creditors. Objection to this testimony was sustained on the ground of incompetency and immateriality. If it is true that a fraudulent concealment of property subject to execution, does not prejudice an otherwise valid claim of exemption, then the court did not err in sustaining the demurrer, regardless of the question of the sufficiency or insufficiency of defendant's answer, in his attempted charge of fraudulent concealment, and if the demurrer was properly sustained, there was no error in refusing to permit the offered proof, because there were no pleadings upon the subject, and too, because such evidence would have been immaterial.

This question then is presented: If plaintiff fraudulently concealed property and refused to surrender the same in execution, equal in amount to the value of property claimed as exempt, does that fact deprive him of an otherwise valid claim of exemption? The authorities are somewhat conflicting. Those holding in the affirmative are confined mostly to the courts of Pennsylvania; while the opposite view is sustained by the courts of North Carolina, Alabama, Mississippi, Missouri, New York, Michigan, and, if we mistake not, Ohio.

As to the property mentioned in the statute as exempt, only one exception is stated, and that is that no article or species of property mentioned in the section shall be exempt

from execution issued upon a judgment recovered for its price, or upon a mortgage thereon. The constitution provides that, "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted." (Const. art. I, sec. 14.)

The statute was undoubtedly passed in compliance with the constitutional requirement. Since the statute declares that the plaintiff is entitled to hold the property in suit as exempt from execution, except in the one case stated, what right have courts to engraft upon the statute another exception? It is provided that one sewing-machine not exceeding in value one hundred and fifty dollars, in actual use by the debtor, or his family, shall be exempt. All other sewing-machines may be sold. He is allowed to retain one that is in actual use, because it is the policy of the constitution and law, and the interest of the state, that no citizen shall be stripped of the implements necessary to enable him to enjoy the necessary comforts of life and to carry on his his usual employment; and that, if he has one, his family shall not be made paupers or beggars in consequence of the follies, the vices, or the crimes of their head. (*Moseley* v. *Anderson*, 40 Miss. 54; *Wilcox* v. *Hawley et al.*, 31 N. Y. 657.)

It is true that in New York and Mississippi the exemption was granted to the "head of a family," while our statute gives the exemption in most instances regardless of family relations. But this difference, we think, does not change the result. It is still true, under our statute, as was said in *Moseley* v. *Anderson*, that the exemption is absolute and unqualified, and its effect is to remove the property beyond the reach of legal process, except in the one case mentioned. The tools and implements of a mechanic, necessary to carry on his trade; the instruments and chests of a surgeon, physician, surveyor, and dentist, necessary to the exercise of their profession; the libraries of an attorney and minister; the implements and appliances of a miner, necessary for carrying on any kind of mining operations, not exceeding five

hundred dollars in value, and two horses, mules, or oxen, with their harness, and food for them for one month, when necessary to be used for any whim, windlass, derrick, car, pump, or hoisting apparatus, are all declared absolutely exempt, except upon a judgment for their price. In the case of a miner, the horses, etc., and their food, are not exempt, except when the former are *necessary to be used* in mining operations. And in the case of a teamster, the two horses, their harness, and one cart or wagon mentioned, are not exempt unless by their use he habitually earns his living. From these different provisions, we think the legislature did not intend to deprive the debtor of his means of obtaining a livelihood for himself, or his family, or both.

In *Megehe* v. *Draper*, 21 Mo. 511, the defense relied on by the defendant was that, at the time of the levy, the plaintiff had other property not specially exempt from execution more than sufficient in value to pay the debt, which he concealed from the officer, so as to keep it out of the reach of the execution. Upon the plaintiff's motion, this part of the answer was stricken out, and the defendant excepted. The court said: "The only matter for our consideration involves the act of the court below in rejecting the evidence, on the trial, and in striking out the answer, or that part of the answer setting up the above matters in defense. If the court properly struck out that part of the answer, then it was proper also to reject the evidence in relation to the same subject-matter.

This court is of opinion that the matter set up in the defendant's answer was well stricken out. It affords no defense to the plaintiff's action. The statutes reserving and exempting certain specific property from execution * * * to a certain amount in value, were not made alone for the benefit of the debtor. He must be the head of a family. The legislature had an eye to the family of the debtor, to his household, and determined to prevent as much suffering and misery from entering into such abodes as they could, by saving to them the small allowance mentioned in the statutes. These statutes, so productive of good to

the classes which generally so much need protection, deserve and meet with liberal interpretation from the courts."

It will be noticed that the Missouri statutes also limit exemptions to "heads of families," and that fact is referred to by the court, as evidence to sustain the proposition that one of the objects of the law was to protect the family. And so it is. But is it any proof that our legislature did not intend to protect the families of debtors because the statute includes single persons as well as those with families? The latter class is certainly included, and as to them, it is as reasonable to presume, under the statute as it is written, that one of the objects of exemption was to protect their families, as it would have been, if persons without families had not been included among the beneficiaries. But in North Carolina, the exemption is general, as it is in this state. The constitution of that state declares that "the personal property of any resident of this state, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt." There is also a general constitutional provision exempting a homestead of the value of one thousand dollars, owned and occupied by any resident of the state. The case of *Duvall* v. *Rollins*, 68 N. C. 220, involved the question of personal property exemption.

The case again came before the court on petition for a rehearing (71 N. C. 221), and the court say: "The personal property exemption can not be reached by execution at all, for as to that, under the constitution, there can be no creditor and no forfeiture by any attempt to make a fraudulent conveyance.

"Our laws have long been so framed as to make fraudulent conveyances void as to creditors, and our habits of thinking run in the same direction, so that it is difficult to realize that another and a new right has been interposed between the creditor and debtor which secures certain of his property, even from his own fraud upon creditors."

And in *Crummen* v. *Bennet*, 68 N. C., 495, this language is used: "A. makes a conveyance of his land to B., which

Points decided.

conveyance is fraudulent and void as to the creditors of A. A creditor takes judgment and issues execution, treating the conveyance of B. as void; can the homestead of A. be sold? The creditor treats the conveyance to B. as void and of no effect. Take that to be so; how can the creditor have any more right against A. than he would have had if the conveyance had not been made? We can see no ground to support the position that an attempt to commit a fraud is a forfeiture of the debtor's homestead; there is no provision of the kind either in the constitution or the statutes. The only legal consequence of a deed with an intent to defraud creditors is, that although valid as between the parties, it is void as to creditors.

"In this case, the fraud did not consist in conveying the homestead; for the creditor could not have reached that by his execution, had the debtor retained his homestead; but the fraud was in conveying the other part of the land. That the creditor can reach by his execution. As to the homestead he has no concern; that matter will rest between the fraudulent donor and donee." (See, also, *O'Donnell* v. *Segar*, 25 Mich. 376; *Callaway* v. *Carpenter*, 10 Ala. 503; *Lockwood* v. *Younglove*, 27 Barb. 508.)

Bracket v. *Watkins*, 21 Wend. 69, cited by counsel for appellant, has been overruled by *Wilcox* v. *Hawley*, 31 N. Y. 657. We do not think the court erred in sustaining the demurrer or in rejecting the offered evidence.

The judgment and order appealed from are affirmed.

[No. 1,083.]

WILLIAM CAIN, ADM'R, ETC., RESPONDENT, *v.* JOHN B. WILLIAMS, ADM'R, ETC., APPELLANT.

PENDENCY OF APPEAL—WHEN DOES NOT SUSPEND OPERATION OF JUDGMENT. The pendency of an appeal, when the appellate court has no other duty than to affirm, reverse, or modify the judgment appealed from, does not suspend the operation of the judgment. The judgment is good until set aside.

REPLEVIN BOND—COMPROMISE WITH PORTION OF SURETIES—ACTION AGAINST OTHERS.—Plaintiff compromised with four sureties, for less than their

liability, and deducted from the amount of his damages the amount paid by them: *Held*, that the remainder is recoverable from one of the other sureties to the extent of his liability.

IDEM—EFFECT OF RELEASE OF SURETIES NOT RAISED IN COURT BELOW. *Held*, that the question whether the release of the four sureties operated as a release of the defendant, could not be considered, because not raised in the court below.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The sureties, upon the bond sued upon, in general terms undertook and acknowledged themselves jointly and severally bound in the full amount of the undertaking. Thereafter the following clause appears in the bond, viz.: "And each of the sureties hereto binds himself with his co-sureties jointly and severally that he will pay the sum as herein agreed to be paid by him, to wit." Then follows the name of each surety and the amount for which he becomes bound. There is no principal to the bond.

Wm. Webster, for Appellant:

I. The intention of the parties who make the agreement should be arrived at without reference to the form made use of by the parties thereto. (Chitty on Cont. 83.)

II. It was the intention of the sureties, while they bound themselves in a joint and several contract to limit their several liabilities in a sum certain, and upon this form of contract a joint action could be maintained and several judgments entered according to the liability of the several sureties to the undertaking or several actions could be maintained against the sureties.

III. The undertaking is a joint and several contract on the part of the sureties wholly independent of the plaintiff in replevin in the suit of *Buckley* v. *Buckley*. (*City of Sacramento* v. *Dunlap*, 14 Cal. 421.) All the parties to the contract are equally bound according to their several liabilities as stated in the undertaking. To permit a recovery against parties not released to the full amount of their original liability, would be a fraud upon them, unless a right of action over for contribution is allowed them against those who

have been released without paying their *pro rata* share of the damages; and to permit a recovery *pro rata* in favor of those who have paid more than their share of the damages against those released, would be a fraud upon them. (Story on Promissory Notes, secs. 423 and 427.) The releases made by the respondent are under seal, technical releases; and released all the parties to the undertaking, unless the statute applies. (1 Comp. L. 465; Story on Promissory Notes, sec. 425; *Armstrong* v. *Hayward*, 6 Cal. 184; *Griffith* v. *Grogan*, 12 Id. 317; *French* v. *Price*, 24 Pick. 13; *Hammatt* v. *Wyman*, 9 Mass. 138.) A covenant not to sue and a covenant of release are different in effect. (*Brown* v. *Williams*, 4 Wend. 360.)

IV. The law of 1866 concerning the liabilities of joint debtors (Comp. L. 465)does not apply to this case. The liabilities of the parties are not such as the law was intended to meet. The parties to the undertaking have fixed their several liabilities, in sums differing one from the other, and such being the case, how could any release be made upon the principal of number as provided in the act? If the sureties have chosen to fix and limit their several liability by several contract, can the contract of each or all in this particular be disregarded, and the liability of each be arranged according to number, as provided by statute concerning joint debtors?

V. The respondent should not have maintained this action pending the appeal to the supreme court in the case of *Buckley* v. *Buckley*. (*Sherman* v. *Dilley*, 3 Nev. 27; *Woodbury* v. *Bowman*, 13 Cal. 634.) For the purpose of showing the general law on matters of appeal preceding the enactment of statutes requiring a special supersedeas to stay execution the following authorities are cited. (*Campbell* v. *Howard*, 5 Mass. 376; *Thompson* v. *Thompson*, Coxe, 159; *Atkins* v. *Wyman*, 45 Me. 399; *Dubois* v. *Dubois*, 6 Cow. 495; *Post* v. *Neafie*, 3 Cai. 28; *Gale* v. *Butler*, 35 Vt. 449; *Levi* v. *Karrick*, 15 Iowa, 444; *Byrne* v. *Prather*, 14 La. An. 663; *Thornton* v. *Mahoney*, 24 Cal. 583; *Penhallow* v. *Doane*, 3 Dall. 87, 118; *Keen* v. *Turner*, 13 Mass. 265; *Paine* v. *Cowdin*, 17 Pick. 142; *Davis* v. *Cowdin*, 20 Id. 510; *Robbins*

v. *Appleby*, 2 N. H. 223, *Tarbox* v. *Fisher*, 50 Me. 236; *Stalbird* v. *Beattie*, 36 N. H. 455; *Stone* v. *Spillman*, 16 Tex. 432.)

William Cain, for Respondent:

I. The undertaking on claim and delivery is either on the part of the sureties a joint and several bond for the full sum of fourteen thousand two hundred and twenty dollars, or a several bond of each for the amount severally stated. If joint and several for the full sum, then the statute "concerning the liabilities of joint debtors" (Stat. 1866–67) applies. If the obligation of the sureties is several, then the release of one will not release any others. (Brandt on Suretyship, sec. 383; *Collins* v. *Prosser*, 1 Barn. & Cress. 682; *People* v. *Breyfogle*, 17 Cal. 504; Pacific Coast Law Journal, Dec. 31, 1881.)

II. No undertaking staying proceedings upon the judgment was filed, and plaintiff's right of action upon his judgment was not suspended. (Freeman on Judgments, sec. 433; *Taylor* v. *Shew*, 39 Cal. 536; *Rogers* v. *Hatch*, 8 Nev. 37.)

By the Court, BELKNAP, J.:

In the year 1873 one Sylvanus Buckley brought an action of claim and delivery of personal property against Armenia Buckley as administratrix of the estate of Henry A. Buckley, deceased. He afterwards obtained the possession of the property by complying with the provisions of chapter II of the civil practice act.

Defendant's intestate, Frank Covington, is a surety upon the undertaking given to the sheriff for the return of the property to the defendant, in case such a return should be adjudged.

Judgment passed against the plaintiff in the suit of *Buckley* v. *Buckley*, and the judgment being unsatisfied, the plaintiff in this action, who has succeeded Armenia Buckley in the administration of the estate of Henry A. Buckley, has sued to recover the amount for which Covington, in his lifetime, became liable on the undertaking.

Plaintiff recovered judgment. Defendant appeals.

From the time of the commencement of this action down to the entry of judgment the case of *Buckley* v. *Buckley* was pending upon appeal in the supreme court. No undertaking to stay execution had been filed.

Defendant contends that the pendency of the appeal suspended the operation of that judgment, and that the court erred in permitting it to be used as the basis of the judgment in this case.

The effect of an appeal under analogous facts was considered by this court in the case of *Rogers* v. *Hatch*, 8 Nev. 35. In deciding the question we will adopt, as our predecessors did in that case, the language employed in *Bank of North America* v. *Wheeler*, 28 Ct. 433: "If the appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors which may have intervened in the trial of the case in the court below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and that court has no other powers or duties than to affirm, reverse, or modify that judgment, or remit the case to the inferior tribunal that it may conform its judgment to that of the appellate tribunal, then such appeal * * * does not vacate or suspend the judgment appealed from; and the removal of the case to the appellate court would no more bar an action upon the judgment than the pendency of a writ of error at common law, when that was the proper mode of correcting errors which may have occurred in the inferior tribunal. That such an action would not be bound by the pendency of such a proceeding is well settled. The judgment below is only voidable, and stands good until set aside." (See, also, *Taylor* v. *Shew*, 39 Cal. 536; *Scott* v. *Pilkington*, 110 Eng. Com. Law, 11; Freeman on Judgments, sec. 328.)

The other objection is to the amount of the judgment rendered against defendant. The court found that the defendant in the suit of *Buckley* v. *Buckley*, plaintiff here, was damaged by the failure of the plaintiff in that suit to return

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the property, in the sum of eleven thousand and thirty-four dollars and forty-four cents.

Four of the sureties upon the undertaking, who were liable thereon in the aggregate amount of ten thousand two hundred and fifty dollars, were compromised with and released upon the payment of three thousand four hundred and sixteen dollars, and satisfaction as against them acknowledged. Because the plaintiff has made this acknowledgment of satisfaction, it is claimed that the amount now recoverable upon the undertaking is the difference between the amount of damages sustained by plaintiff and the aggregate amount for which the four sureties were liable, to wit, the sum of seven hundred and eighty-four dollars and forty-four cents.

But the position is untenable. Plaintiff properly deducted from the amount of his damages the amount paid by the four sureties. The remainder is recoverable from the defendant to the extent of his liability.

The question whether the release of the four sureties operated as a release of the defendant can not be considered upon this appeal, because not made in the court below.

Judgment affirmed.

Petition for rehearing denied.

[No. 1,092.]

WILLIAM CAIN, ADM'R, ETC., RESPONDENT, *v.* E C. SESSIONS ET AL., APPELLANTS.

REPLEVIN BOND—LIABILITY OF SURETIES.

William Webster, for Appellants.

William Cain, for Respondent.

By the Court, BELKNAP, J.:

Substantially the same questions are presented by this case as by the case of *Cain* v. *Williams, ante.* Upon the authority of that case the judgment herein appealed from is affirmed.

[No. 1,052.]

THE STATE OF NEVADA, RESPONDENT *v.* THE CONSOLIDATED VIRGINIA MINING COMPANY, APPELLANT.

SPECIAL LAW—SECTIONS 2 AND 4 OF "ACT TO DISCONTINUE LITIGATION" IN CERTAIN TAX SUITS, UNCONSTITUTIONAL.—Sections 2 and 4 of the "act to discontinue litigation touching inequitable claims for taxes and penalties" (Stat. 1879, 143), are unconstitutional, being a special law for the "collection of taxes for state, county, and township purposes" in violation of section 20, art. IV, of the constitution.

GENERAL LAW—ACT PRESCRIBING ADDITIONAL PENALTY IN TAX SUITS—CONSTITUTIONAL.—The "act prescribing an additional penalty for the non-payment of taxes in certain cases after suit" (Stat. 1873, 169), is constitutional, it being a general law imposing the same burdens upon all persons similarly situated and belonging to the same class.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

C. J. Hillyer and *B. C. Whitman*, for Appellant:

I. There is nothing conclusive or even applicable to this appeal in the former decision; as this proceeds upon a different state of facts, and is to be governed by different sections of the statute. There may be dicta in such opinion applicable to the entire statute, but they do not constitute any portion of the law of the case. (*Mulford* v. *Estudillo*, 32 Cal. 138.) The same questions are not presented in the present appeal, as will appear by the record in the former case, so the opinion can not govern this case. (*McKinley* v. *Tuttle*, 42 Cal. 576; *Russell* v. *Harris*, 44 Id. 489.)

II. The rule of law laid down in the former decision as to special and general statutes is all that is claimed here by appellants; the application thereof in the decision is claimed to be illogical; and, as to the other portions, there is every reason why they should be discarded, and that the court will return to the line of decision previously held and laid down in *Youngs* v. *Hall*, 9 Nev. 212; and *Odd Fellows' Bank* v. *Quillen*, 11 Id. 109.

Argument for Respondent.

The authorities cited by counsel are reviewed in the opinion.

Lewis & Deal, for Respondent, argued that the reasoning of the former decision was applicable to and conclusive upon all questions presented in this case.

M. A. Murphy, Attorney General, also for Respondent:

I. The act under consideration is unconstitutional for the following reasons:

1. Because it embraces more than one subject, and the subjects are not expressed in the title. (Sec. 17, art. IV, Const. of Nev.) The acts to be done by section 4 are in nowise suggested, much less stated, in the title to the bill. There is nothing in the title that would operate to warn the mind of a legislator or any one else, that the bill would operate not only to discontinue suits between certain parties in some cases, but would satisfy judgments in other cases and between other parties for less sums than what the judgments call for. Each and every act therein set forth is in direct violation of our unrepealed revenue laws. (Cooley on Const. Lim. 81, 83, 141, 144; Sedgwick, Stat. and Const. L. 517–530; Potter's Dwarris on Stat. 103–107; *People* v. *Mahoney*, 13 Mich. 481; *State* v. *Silver*, 9 Nev. 227; *City of St. Louis* v. *Tiefel*, 42 Mo. 578.)

2. Because the whole act of which section 2 is but a part is invalid, for the reason that it is a special law for the collection of taxes, which is prohibited by section 20 of article IV of our constitution. It is special, because it relates to particular suits only. It has no general application; it is not a rule of conduct or principle for the government of the people; it has no prospective operation; it seeks to affirm certain illegal acts and to take from the court the control of certain suits therein pending. It must be pleaded, and requires evidence to give it application and effect. (*Lewis* v. *Webb*, 3 Greenl. 326; *Picquet, Appellant*, 5 Pick. 64; *Town of Lancaster* v. *Barr*, 25 Wisc. 560; *Griffin* v. *Cunningham*, 20 Gratt. 31.) Taxes are debts recoverable like any similar obligations, and subject to the same conditions, and a law

releasing a person or company from the payment of such debts is unconstitutional and void. (*City of Burlington* v. *B. & M. R. R. Co.*, 41 Iowa, 134; *City of Dubuque* v. *Ill. Central R. R. Co.*, 39 Id. 56; *Wilson* v. *Supervisors*, 47 Cal. 91.)

3. Because it is an attempted interference with the functions of the judiciary, and is therefore in conflict with section 1 of article III of our constitution. (*Guy* v. *Hermance*, 5 Cal. 73; *McClain* v. *Easly*, 4 Baxter, 520; *Wally's Heirs* v. *Kennedy*, 2 Yerger, 554; *Governor* v. *Porter*, 5 Humph. 165; *Merrill* v. *Sherburne*, 1 N. H. 199; *Davis* v. *Trustees*, 21 Wisc. 491; *Staniford* v. *Barry*, 1 Aiken, 314.) The legislature is not authorized to exercise any portion of the judicial power; it can not set aside a judgment or decree, nor can it require the judiciary to give a new hearing once passed upon. (*People* v. *Supervisors*, 26 Mich. 22; *Trustees* v. *Bailey*, 10 Fla. 238; *De Chastellux* v. *Fairchild*, 15 Penn. 18; *Taylor* v. *Place*, 4 R. I. 324; *Denny* v. *Mattoon*, 2 Allen, 361; *State* v. *Fleming*, 7 Humph. 152; *Moser* v. *White*, 29 Mich. 59; *Lewis* v. *Webb*, 3 Greenl. 326; *Lancaster* v. *Barr*, 25 Wisc. 560; *Griffins* v. *Cunningham*, 20 Gratt. 31; *Assessment Board* v. *A. C. R. R. Co.*, 59 Ala. 551; *Kimball* v. *Rosendale*, 42 Wisc. 407; *L. B. & S. A.* v. *Graham*, 7 Neb. 173; *Oliver* v. *McClure*, 28 Ark. 555; *Pryor* v. *Downey*, 50 Cal. 388; Sedgwick on Stat. and Const. Law, 166–170.)

II. Sections 3172 and 3238 of compiled laws are constitutional. The constitutionality of acts imposing penalties have been affirmed by the following decisions: *Scott* v. *Watkins*, 22 Ark. 556; *Craig* v. *Flannagin*, 21 Id. 319; *Pope* v. *Macon*, 23 Id. 644; *Kansas Pacific Railway Co.* v. *Amrine*, 10 Kan. 318; *The C. R. & M. R. R. Co.* v. *Carroll Co.*, 41 Iowa, 189; *Lacey* v. *Davis*, 4 Mich. 157; *Durant* v. *Mayor*, 37 N. J. 271; *Mulligan* v. *Hintrager*, 18 Iowa, 171; *Butler* v. *Bailey*, 2 Bay. 244; *People* v. *Seymour*, 16 Cal. 332; *Drexel & Co.* v. *Commonwealth*, 46 Pa. 31; *Commonwealth* v. *Wyoming Valley C. Co.*, 50 Pa. 410; *Delaware Div. C. Co.* v. *Commonwealth*, 50 Id. 399; *State* v. *Welch*, 28 Mo. 600; *Olds* v. *Commonwealth*, 3 A. K. Marsh. 465.

Argument for Appellant in reply.

Neither sections 3172 nor 3238 are retroactive or special; they do not exempt any class of persons or property, but treat all alike.

C. J. Hillyer and B. C. Whitman, for Appellant in reply:

I. Nothing can become "the law of a case" except that which has been adjudicated. The question is not as to the force of a decision as authority, nor as to the force of a series of decisions under the doctrine of *stare decisis*. It is simply a question of *res judicata*. The doctrine of the law of the case is nothing else than an application to a second appeal of the doctrine of *res judicata*. (*Sibbald* v. *The United States*, 12 Pet. 488; *Washington Bridge Co.* v. *Stewart*, 3 How. 424; *Phelan* v. *San Francisco*, 20 Cal. 40; *Leese* v. *Clark*, Id. 388.)

II. A decision is the application of a legal principle to a certain state of facts. Under similar but different facts it may be persuasive by analogy, but unless the facts are the same it is no adjudication. (*Nieto* v. *Carpenter*, 21 Cal. 488; *Mulford* v. *Estudillo*, 32 Id. 135; *Lucas* v. *San Francisco*, 28 Id. 591; *McKinley* v. *Tuttle*, 42 Id. 576; *Russell* v. *Harris*, 44 Id. 489.)

III. The sections under consideration are constitutional. They are a release by the state of a class or classes of demands over which the legislature has full control. The fact that they are retroactive does not affect their validity. (Sedgwick on Const. & Stat. Const. 406–414; *Guildford* v. *Supervisors*, 3 Ker. 143.)

IV. It is not a violation of article IV, section 20 of the constitution, because it is not legislation "for the assessment or collection of a tax." A penalty is not a tax nor portion thereof; it is a legislative imposition.

V. All that portion of the brief of the attorney general which treats of the inability of the legislature to exercise judicial functions, or control judicial proceedings, is based upon a misconception of the real force and character of the legislation in question. If this were a law regulating, or attempting to interfere with the methods of judicial procedure between private litigants, the remarks and citations

would be applicable. But the provisions here involved have no such purpose, and consequently can have no such effect. The state of Nevada is the party in interest, and the party litigant. The obligation sought to be affected, and by the sections referred to surrendered, is one due to itself. The law in question deals with the demand, and not with any of the methods of enforcing it. It is an act of grace on the part of the sovereign, announced by its only legitimate agent therefor. Neither the existence nor non-existence of litigation, nor the condition of existing litigation in any way limits or affects the power of the parties thereto to deal with its subject-matter. A release is as effectual after judgment obtained, as before suit begun. The legislature is the sole constitutional agency for creating or discharging state obligations.

VI. A penalty is not a tax, nor any part of a tax. If, because it is collected in the same suit it is a tax, then the costs are taxes. Over the matter of penalties and costs the legislature has utter control within constitutional restrictions as to form of legislation. A legislative release of a tax may violate article X of the constitution, but a release of a penalty or costs, the legislation being otherwise formal, violates neither this nor any other constitutional inhibition of legislative power.

By the Court, LEONARD, C. J.:

On the twenty-seventh of April, 1878, judgment herein was modified in the court below according to a previous order of this court. (13 Nev. 229.)

September 1, 1880, appellants moved the court for an order directing the satisfaction of said judgment on payment of the amount of all taxes and costs included in the same, exclusive of the penalties and percentage, in pursuance of the fourth section of a statute of this state, approved March 17, 1879, entitled, "An act to discontinue litigation touching inequitable claims for taxes and penalties." (Stat. 1879, 144.)

The court denied the motion, and this appeal is taken from an order denying the same.

The statement on appeal shows that, on the hearing of said motion, it was made to appear to the court that, after the rendition of the original judgment, and in the month of May, 1877, the defendants paid all taxes and costs included therein, but not the penalties for non-payment at the time required by law; and that the amount so paid was duly credited upon the judgment.

It was also shown that no execution was issued upon either the original or modified judgment prior to August 30, 1880. In support of the motion defendants relied upon the fourth section of the statute above referred to, with the conditions of which they had fully complied.

Sections 2, 3, and 4 are as follows:

"Sec. 2. All claims by the state, or by any county, for penalties or percentages, which had accrued previous to the first day of July, 1877, on account of non-payment, at the time required by law, of any previously levied tax, when the original tax and costs were in fact paid prior to said date, are remitted and discharged, and the district attorneys of the several counties are directed to dismiss all actions heretofore commenced for the recovery of such penalties and percentages.

"Sec. 3. Wherein suits commenced for the recovery of taxes delinquent prior to the first day of July, 1877, a judgment has, by the consent of the district attorney, been entered for the amount of the original tax and costs, exclusive of any penalty or percentage due, or claimed by reason of default in payment at the time prescribed by law, the action of the district attorney in so consenting to said judgment is hereby ratified and approved.

"Sec. 4. Wherein actions of the character specified in the two preceding sections, a judgment has been entered for the taxes and also for the penalties or percentages prescribed by law for default in payment, such judgment, if no execution was issued thereon prior to the first day of February, 1877, shall be satisfied and discharged upon payment of the original tax and other costs, exclusive of the amount of the penalties and percentages included therein and still unpaid."

Section 3 has been declared by this court to be in plain and palpable violation of sections 20 and 21 of article IV of the constitution, which declare that "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say * * * for the assessment and collection of taxes for state, county, and township purposes." (*State* v. *Cal. Mining Company and the Consolidated Virginia M. Co.*, 15 Nev. 240, 259.)

The validity of sections 2 and 4 was not passed upon directly, in those cases, and it is urged, therefore, that the decisions therein do not become "the law of the case." We shall consider this case upon its merits, and refer to the cases cited as authorities so far as they may be found applicable.

In those cases this court decided that the legislature had no power, under the constitution, to ratify the action of a district attorney in suits commenced for the recovery of taxes delinquent prior to the first day of July, 1877, wherein, by the consent of the district attorney, judgment has been entered for the amount of the original tax and costs, exclusive of any penalty or percentage due or claimed by reason of default in payment at the time prescribed by law; and as before stated, those decisions were made upon the ground that such action by the legislature was in violation of the sections of the constitution before referred to.

In my opinion, if section 3 is unconstitutional for the reason stated, sections 2 and 4 are so, for the same reason. If the legislature, in 1879, could not ratify the prior consent of a district attorney to remit any penalties due previous to July 1, 1877, in consideration of the entry of judgment without objection for the original tax and costs, then it certainly could not remit or discharge such penalties, in cases where no judgment had been taken, or where judgment had been entered for the tax, costs, and penalties; that is to say, if section 3 encounters the constitution for the reason that it is special legislation for the collection of state, county, or township purposes, then sections 2 and 4 must be held invalid for the same reason. The legislative intent was the same in each section, which was to relieve

certain persons from the payment of penalties resulting under the general law, from the non-payment of taxes at the time required, and that was what was done, if they are constitutional. No reason is given by counsel for appellants for holding that the legislature had power, under the constitution, to release and discharge penalties under the circumstances stated in sections 2 and 4, if the same result could not be attained by section 3, and we think none can be given. It follows that, to hold with appellants on this appeal, would involve the necessity of admitting that, upon the former appeal, the court erred in its controlling theory of constitutional construction and in its conclusion.

That case was argued with signal ability, and it received the studious, conscientious consideration of every member of the court. The result was, my brother Hawley concluded that the decision in *Youngs* v. *Hall*, 9 Nev. 212, was applicable to the case then in hand, and considered it to be his duty to follow it, although he dissented when that case was decided, and although he still thought that the conclusion reached in *Youngs* v. *Hall* was wrong; while the other members of the court came to the conclusion announced, and upon the facts presented, did not consider the former case applicable or decisive, even though upon the facts existing in that case, the decision was correct.

Youngs v. *Hall* decided that the acts of 1867–1869, to provide for the payment of Esmeralda county indebtedness, were not special laws, for the reason that they operated alike upon all persons similarly situated, whether residing in the county or out of it; that is to say, upon all creditors of the county, and that a law so operating need not apply to all the counties of the state in order to be general. In my opinion, the gist of that decision, instead of being favorable, is fatal to appellant's theory of sections 2 and 4, under consideration. There, all persons similarly situated, that is, all creditors, were treated alike; while here, sections 2 and 4 were so framed that it was not possible for all who might be delinquent at that time, or in the future, to avail themselves of the favor granted to a few. The taxes of a thousand taxpayers of the state might have become

delinquent subsequent to the first of July, 1877, and they, as well as the penalties, might have been unpaid when the statute was passed, still, not one of them could derive any benefit. And even though the same delinquents had paid their taxes, without the penalties, before the law was passed, yet every one was excluded. It is necessary in the consideration of this case, first, to determine the nature of sections 2 and 4. Are they general or special legislation? Second, Are they legislation for the collection of state, county, or township taxes? What kind of a law, then, did the legislature intend to pass, and what did it succeed in passing? Its title is "An act to discontinue litigation touching *inequitable* claims for taxes and penalties." To say the least, it is hardly probable that the legislature thought *all* claims for penalties were "inequitable." If that had been the legislative idea, the general law imposing them would have been repealed in terms, or the statute would have embraced all, instead of those claims that had accrued prior to July, 1877. There could have been no intention of affecting any claims for penalties that accrued, or might accrue, after the date just mentioned, because the benefits granted were, *ex industria*, limited to claims that had accrued prior to that time; and of them none were included unless the original tax and costs had been in fact paid prior to said date. Out of the whole body of delinquents, then, that existed at the date of the law, a fraction only was chosen as objects of favor. The attempt was to remit all claims for penalties prior to a certain date, regardless of the amount, and to leave those that had accrued subsequently, as well as those that might accrue in the future, to be enforced according to the provisions of the existing law. Except in the cases embraced within the statute the general law was undisturbed, and as to the exceptional cases the intent was to annul the general law.

Does not this law, then, affect only individuals and not a class? Does it not confer special privileges upon one or more persons in nowise distinguished from others of the same category? Who were in the same situation as to claims

for penalties under the general law? The answer is, all delinquents, or at least all of the same class. Upon the former appeal in this case the court said, in relation to the general law imposing penalties in cases like this (Comp. L. 3238): "If the legislature had attempted, by a proviso or otherwise, to exempt from its operation any individual or individuals in nowise distinguished from others upon whom it was left operative, either the proviso would have been held void, or the whole law would have been declared unconstitutional." And in *Lewis* v. *Webb*, 3 Greenl. 336, the court said: "Can it be supposed for a moment that if the legislature should pass a general law and add a section by the way of proviso that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would not receive the sanction or even the countenance of a court of law? And how does the supposed case differ in principle from the present? A resolve passed after the general law can produce only the same effect as such proviso. The case of *Holden* v. *James*, 11 Mass. 396, is a direct authority on this point. The court there decided that the legislature have no authority, under the constitution, to suspend the operation of a general law." It is admitted, of course, that in the two cases just referred to the special resolves of the legislature were intended to apply to only one or two persons, and that they were named. But it can not be denied that it makes no difference whether the law is special as to one or one hundred. It is true, also, that if a few among many in the same situation are named as the objects of peculiar privileges, or as persons upon whom special burdens are imposed, the act of naming is strong proof of the special character of the law. But the naming itself does not make the law special. It is only proof that it is so, if only a fraction of many in the same situation are named.

Now, why is not this law as certainly special as it would have been if all who are embraced in sections 2 and 4 had been named? There is no more doubt now than there would have been then, that there was no intention of inter-

fering with the operation of the general law as to any delinquent subsequent to the date named. Between that time and the passage of the law, in March, 1877, and thereafter, all penalties were to be enforced. Suppose our constitution prohibited, in terms, all special legislation as to fixing the period of limitation of actions. Then, as now, the legislature could divide different causes of action into classes, and provide, in one class, say promissory notes, that actions should be brought in six years from maturity, and in another class, say book accounts, in two years. Such legislation would be general and would satisfy the constitution. It could be changed by general law affecting all of a class equally, but any subsequent statute extending or abridging the time as to a part of a whole class would be special. Under the circumstances just stated, a statute enlarging or shortening the time for the commencement of actions upon all promissory notes executed on a certain day, or between certain days, in the past, would be special. It could affect only a few persons of the whole class to which they belong. It might as well mention by name the causes of action intended to be embraced in the law. It is claimed that the statute in question is general, because the legislature had the power to separate taxpayers into classes, and that the persons embraced therein form a class who are all treated alike. The mere remission, by retroactive laws, of penalties due from a fraction of delinquents is, in no just sense, a classification, as that word is used by the courts, such as will justify the distinction here attempted. The only reason why a law for the collection of taxes, which adopts the same methods for all of a class, but different ones for another class, is, or can be, held general, and therefore constitutional, is, because it treats alike all who are in the same situation. This statute does not attempt to do that; but, on the contrary, it in plain terms makes an arbitrary distinction between persons similarly situated.

Besides *Youngs* v. *Hall*, counsel for appellants refer us to several other cases decided by this court, in support of their theory of the nature of this statute.

In *Clarke* v. *Irwin* the court did not say the statute in

question would not have been in violation of the constitutional provision under consideration, if the legislature had attempted to "regulate the election of county and township officers," as those words were construed by the court. But it was held that, in the act then being considered, there was no such attempt, and consequently that there was no violation of section 20 of article IV. And from the facts before it the court was unable to say that a general law could be made applicable, and therefore that the act violated section 21 of the same article. *Evans* v. *Job*, 8 Nev. 322, followed *Hess* v. *Pegg*, 7 Nev. 29, where the only question was whether the statute locating the county seat of Washoe county at Reno was obnoxious to the twenty-first section of the fourth article of the constitution. It was claimed to be so, for the reason that a general law could have been made applicable. And upon that question the court's conclusion was the same, substantially, as in *Clarke* v. *Irwin*.

In *Ex parte Spinney*, the petitioner's claim of illegal imprisonment was based upon the assertion that the act in question (Stat. 1875, 46), was "a special law in a case where a general law is applicable, contrary to the provisions of section 21 of article IV of the constitution of this state."

It will be seen that in none of the cases above cited, except *Youngs* v. *Hall*, was the question directly considered, whether the statute assailed was a special law embracing any case enumerated in section 20 of article IV, and consequently invalid.

In nearly all of them general and special laws are defined, as they are in other cases, and the definition given of a special law by this court on the former appeal is fully sustained. Indeed, it is conceded to be correct by counsel for appellants. Such a law, then, is "one which affects only individuals and not a class—one which imposes special burdens or confers peculiar privileges upon one or more persons in nowise distinguished from others of the same category." (15 Nev. 249.)

In two cases this court has stated the reasons why section

20, of article IV, was made a part of the constitution. In *Ex parte Spinney*, it is said to have been for "the prevention of unfair discrimination between citizens, and to secure to everyone the enjoyment of the same privileges which are enjoyed by others similarly circumstanced."

In *Evans* v. *Job*, the court said: "Sections 20 and 21 were doubtless incorporated into our state constitution to remedy an evil into which it was supposed the territorial legislature had fallen, in the practice of passing local and special laws for the benefit of individuals, instead of enacting laws of a general nature for the benefit of the public welfare."

Our constitution does not forbid the passage of retroactive laws, like the one in hand, but the fact that they are of that character is often, if not always, strong evidence that they are special and were intended to be so.

To my mind it is plain that if the sections in question can escape being placed among special laws, then, by the use of general words, the legislature may enable one or more delinquents to evade the payment of penalties in the very teeth of a general law imposing them; then one or more persons, by retroactive legislation, may escape the burdens borne, and to be borne, by others in the same situation; then from any class of taxpayers established by general laws, the assessment and collection of whose taxes must be governed by such laws, a new class may be selected for the sole purpose of making them recipients of favors denied to all others. If these things can be, under the constitution, then section 20 is a dead letter.

Before discussing the second question stated above, it is proper to say we concede to the full extent claimed that the state, through its legislature, may do what it will with its own, except when that body is forbidden by the constitution to do anything specified therein; and whatever may be done at all may be accomplished by special or general legislation, except in cases where the former method is prohibited. But the legislature has no power to pass special laws in any of the cases enumerated in section 20 of article IV,

and if it does so, it is the duty of the courts to so declare, however unpleasant the task may be.

We come now to the second question. Are sections 2 and 4 legislation "for the assessment or collection of taxes for state, county, or township purposes?" Counsel for appellants say it is not of that character, "because it is not for the assessment or collection of a tax; that a penalty is not a tax, or a portion of one; it is a legislative imposition."

On the former appeal in this case the court said: "The only question to be decided, therefore, is whether this law is special, and not general; for that it relates to the collection of taxes is not and can not be denied."

In the clause of the constitution, "for the assessment and collection of taxes," etc., it is evident that the word "for" was intended to mean, "with respect to," or "with regard to." Such are the definitions given by lexicographers. This, then, is the constitutional prohibition: "The legislature shall not pass local or special laws * * * with respect to, or with regard to, the assessment and collection of taxes for state, county, and township purposes."

In other words, the property of persons belonging to the same class shall be assessed, and the taxes thereon collected, under the same general laws. Within the restriction just stated it can not be denied that, "the grant of full power to tax carries with it authority to use all means necessary to accomplish the object." (*Slack, Administrator*, v. *Ray*, 26 La. Ann. 675.)

The imposition of penalties for non-payment is one of the means employed by the state in collecting its taxes, and it is legitimate. (*Slack, Administrator*, v. *Ray*, 26 La. Ann. 675.) And in *Morrison* v. *Larkin*, 701 of the same volume, the court say:

"Having power to collect taxes, the state has authority to use whatever means that are necessary to accomplish the object. * * * If there were no damages and no forfeitures, how could the state collect taxes, if from combination among bidders or otherwise, no one would bid for property when offered for sale? Without the fear of penalties and

forfeiture of his land to the state, an obstinate taxpayer might successfully withhold from the state her legitimate revenues." Many reasons may have existed for the imposition of penalties; but, in our opinion, the prominent one was that it would act as a strong incentive to prompt payment of the tax. If a tax is paid within the time allowed, the state is satisfied. It prefers prompt payment without penalty, to an enforced one with penalty; and in order to secure the first it has made provision for the last.

It is true that the statute under consideration was not passed *for the purpose of collecting a tax*, but it is one *with respect to the collection of taxes*, because in certain cases it undertakes to annul the general law, and, if constitutional, does annul the general law by dispensing with one of the principal means adopted thereby, as to all taxpayers, for the collection of taxes.

All laws establishing the means and methods of collection are laws "for the collection of taxes." It follows that such means and methods must be fixed by general law, and they can not be materially changed except by general law, embracing at least an entire class. The legislature can not, by special law, interrupt the operation of a general law providing for the assessment or collection of taxes.

Otherwise the constitutional provision would be useless. If a general law for the collection of taxes can be set aside, annulled, suspended, or repealed by a special law in a given case, all the evils incident to special legislation are liable to result at any time. If it can be done in one case, so it may in many cases, or all, and thus the subject that the constitution declares shall be governed by general laws may be controlled by special statutes. Our statutes imposing penalties for non-payment at the times required, are enactments for the collection of taxes, and they would have been unconstitutional if they had not been made general. A statute remitting penalties in certain cases, but not in all, is legislation with respect to the collection of taxes. It curtails the means and interferes with the methods adopted by the general law. Such a law is, "with respect to the col-

lection of taxes," as surely as one dispensing with suits for their collection would be.

In *Ex parte Pritz*, 9 Iowa, 30, the petitioner was arrested under a warrant issued by the police magistrate of the city of Davenport, for the violation of a city ordinance. The office of police magistrate was created by an act of the general assembly, prior to the adoption of the constitution in force in 1858, which prohibited the passage of local or special laws * * * "for the incorporation of cities and towns." Subsequent to the adoption of the constitution, an act was passed by the legislature amendatory of the original act incorporating the city of Davenport, and by the fourth section thereof the office of police magistrate was abolished.

It was claimed by the prosecution that the amendatory act above mentioned was void, because such legislation was prohibited by the constitution, and, consequently, that the office of police magistrate was not abolished. By the defense it was contended that the prohibition against passing laws for the *incorporation* of cities and towns did not take away the power to *amend* an act of incorporation in existence before the adoption of the constitution.

We quote from the opinion: "It is claimed that the prohibition to pass laws for the *incorporation* of cities and towns does not take away the power to pass laws for the amendment of such laws. * * * In the interpretation of the constitution, as in the interpretation of laws, however, we are to ascertain the meaning by getting at the intention of those making the instrument. What thought was in the mind of those making the constitution—what was their intention, is the great leading rule of construction.

Let us see, then, what was the intention in incorporating sec. 30 of art. 3 into the constitution. The ready and obvious answer is, to prevent special or local legislation; to require that the legislature should pass general laws upon all subjects named, and in all other cases where such general laws could be made applicable. There can be no question but that it was designed to confine the legislature to

general legislation, and leave the people in their municipal capacity to organize, and carry on, their government under such general laws. If this be so, then to say that the legislature may not pass a law to *incorporate* a city, but may to amend an act of incorporation in existence before the adoption of the constitution, or charters formed under the general law, would make this provision of the constitution, practically, amount to nothing. For, if they may amend, they may to the extent of passing an entire new law, except as to one section. Or they may, at one session, amend half the law, and at the next, the other half, and thus the plain and positive prohibition of the fundamental law would be evaded. By such a construction the evil sought to be remedied would continue, if possible, in a more objectionable form. * * * But, again, to say that the prohibition to pass laws for the incorporation of a city does not include a prohibition to *amend*, we think is narrowing the language used to an unwarranted extent. When we speak of an act or law to incorporate a city, it may be conceded that we are understood to refer to a law *creating* the corporation. But if a law is passed that changes or modifies the act creating such law, it is as much for the government of the corporation as was the original act; and it would certainly seem that, if the legislature can not create, neither can they legislate so as to change that which was previously properly created." So we say in this case; if the legislature had not power to pass special laws with respect to the collection of taxes, then it could not, by such laws, legislate so as to change those general laws which were previously properly enacted. In other words, when a general law is passed which provides the ways and means for the collection of taxes, the complete operation of that law can not be materially interrupted, except by the enactment of a general law upon the subject, and until such a law is passed the original act remains in full force and must be carried out, regardless of any special law. (See *Atchison* v. *Bartholow*, 4 Kan. 124; *Davis* v. *Woolnough*, 9 Iowa, 106.)

But it is said that if the sections under consideration are unconstitutional, then section 3238, Comp. L., imposing the

Points decided.

penalty here sought, is equally so. We agree with counsel for appellants that the last-named section is constitutional. It is a general law imposing the same burdens upon all persons similarly situated, and belonging to the same class. The legislature had the power, by general law, to impose a heavier penalty upon one class than upon another, if, in their judgment, there was good reason for so doing. The legislature is the judge of the means necessary for an efficient system of collection, and within reasonable limits, at least, its discretion may be exercised by general legislation.

If we correctly interpret the argument of counsel for appellant, it is that section 3238 is constitutional for the reasons given above, and that the sections under consideration are so for the same reasons. That is to say, by these sections the legislature made a new class, consisting of the persons embraced therein. This argument has already been answered. If it could be held that these persons constitute a class, still it would be true that they were made such by special law enacted for the sole purpose, and as a means, of nullifying, in part, the intended operation of the general law. The purpose must fail, because the means, being prohibited, are inadequate.

The order of the court below is affirmed.

BELKNAP, J., having been of counsel at a former trial in the court below, did not participate in the foregoing decision.

[No. 1,053.]

THE STATE OF NEVADA, RESPONDENT, *v.* THE CALIFORNIA MINING CO. ET AL., APPELLANTS.

SPECIAL LAW.—(See *State* v. *Con. Virginia M. Co.*, *ante*, 432.)

C. J. Hillyer & B. C. Whitman, for Appellants.

Lewis & Deal and *M. A. Murphy*, Attorney General, for Respondent.

By the Court, LEONARD, C. J.:

The questions involved in this case are the same, substantially, as those decided in the case of the *State* v. *The Consolidated Virginia Mining Company et al.* (No. 1052), and upon the authority of that decision, as well as that in the case of the *State* v. *The California Mining Company et al.*, 15 Nev. 240, the judgment appealed from is affirmed.

BELKNAP, J., having been of counsel in the court below, did not participate in the foregoing decision.

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Youngs v. Hall, 9 Nev. 212, in State v. Con. Va. M. Co. 439.

CERTIFICATE.

TRANSFER OF CERTIFICATES OF MINING STOCK—WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING TITLE. (See Stock, 2, 3.) 185.

CERTIFICATE OF REGISTER OF LAND OFFICE—EVIDENCE OF CONVEYANCE OF LAND. (See Evidence, 4.) 229.

CERTIORARI.

1. LEGALITY OF COSTS—NOT REVIEWABLE.—If the court erred in allowing any costs that were not taxable against the relator, it was not an excess of jurisdiction, and its action, in this respect, can not be reviewed upon certiorari. *State ex rel. Quinn* v. *District Court*, 76.

CHINA AND CHINAMEN.

THE JURY LAW OF THIS STATE IS NOT IN CONFLICT WITH THE TREATY WITH CHINA. (See Jury, 1.) 51.

RIGHT OF CITIZENSHIP—NOT CONFERRED UPON CHINAMEN. (See Citizenship, 1.) 51.

CITIZENSHIP.

1. RIGHT OF CITIZENSHIP—NOT CONFERRED UPON CHINAMEN.—The right of citizenship is not conferred by the amendments to the constitution of the

United States, or the treaty between the United States and China, upon the Mongolian race, except such as are born within the United States. *State* v. *Ah Chew*, 51.

CITIZENS MAY BE EXCLUDED AS JURORS. (See Jury, 2, 3.) 51.

CIVIL PRACTICE ACT.

(See PRACTICE ACT.)

COMPLAINT.

ACTION BY SURVIVING PARTNER ON PROMISSORY NOTE EXECUTED IN FIRM NAME AFTER DEATH OF A PARTNER—SUFFICIENCY OF COMPLAINT. (See Pleadings, 1.) 85.

ACTION AGAINST TRUSTEES OF CORPORATION FOR DEFRAUDING STOCKHOLDERS—SUFFICIENCY OF COMPLAINT. (See Pleadings, 2.) 157.

AMENDMENT OF COMPLAINT AFTER FINDINGS ARE MADE—WHEN NOT ALLOWABLE. (See Pleadings, 4.) 157.

ACTION ON MECHANICS' LIEN—SUFFICIENCY OF COMPLAINT. (See Mechanics' Liens, 1, 2.) 271.

SURETY ON OFFICIAL BOND CAN NOT RECOVER FULL DAMAGES FROM CO-SURETIES. (See Sureties, 1, 2.) 298.

AMENDMENT OF COMPLAINT UPON ACCOUNT STATED—EFFECT OF UPON ATTACHMENT. (See Pleadings, 6–9.) 388.

MISTAKE IN ORIGINAL COMPLAINT—WHO CAN TAKE ADVANTAGE OF. (See Pleadings, 7.) 388.

CONSTITUTION.

1. OPIUM ACT—CONSTITUTIONALITY OF.—Section 1 of the Opium Act (Stat. 1877, 69) does not conflict with any of the provisions of the constitution of this State. *State* v. *Ah Chew*, 50; *State* v. *Ah Gonn*, 61; *State* v. *Ching Gang*, 62.
2. STATE PRISON ACT (STAT. 1881, 109) CONSTRUED—COMMUTATION OF PRISONER'S SENTENCE—UNCONSTITUTIONAL IN PART.—*Held*, that the act in question, in so far as it attempts to commute any portion of the sentence imposed by the courts prior to the time the act took effect, is inoperative and void, because it interferes with the judiciary. *Ex parte Darling*, 98.
3. LOTTERY—ACT TO AID NEVADA BENEVOLENT ASSOCIATION UNCONSTITUTIONAL.—The act to aid the Nevada Benevolent Association in providing means for the care and maintenance of the insane of Nevada (Stat. 1881, 166) provides, that it shall be lawful for the association to give public entertainments, to sell tickets of admission, to distribute among the ticket-holders personal property, etc., and to regulate the distribution by raffle or other schemes of like character: *Held*, that the scheme or enterprise in which the association is engaged is a lottery, and that the act is unconstitutional. *State ex rel. Murphy* v. *Overton*, 136.
4. PRESIDENT PRO TEM. OF THE SENATE NOT ENTITLED TO EXTRA PAY—CONSTITUTION.—The legislature passed an act in favor of relator, for payment of his services as president *pro tem.* of the senate, in addition to his

regular pay as a senator: *Held*, that this was in effect an attempt to increase his compensation as a senator, and hence, unconstitutional. (Art. 4, sec. 33.) *State ex rel. King* v. *Hallock*, 152.

5. IDEM—OFFICER.—No money can be drawn from the treasury as compensation to an officer of the legislature, except when the compensation has been fixed by a law in force prior to the election of such officer. (Const., art. 4, sec. 28. *Id.*

6. STATUTE TO EMBRACE BUT ONE SUBJECT—SECTION 17 OF ARTICLE IV. OF THE CONSTITUTION CONSTRUED.—*Held*, that the general purpose of section 17 of article IV. of the constitution, that "each law shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," is accomplished when a law has but one general object which is fairly indicated by its title. *Klein* v. *Kinkead*, 194.

7. BONDED INDEBTEDNESS OF STATE—SECTIONS 2 AND 3 OF ARTICLE IX. OF THE CONSTITUTION CONSTRUED.—In construing these provisions of the constitution: *Held*, that the object in authorizing a bonded indebtedness was to enable the state to maintain its business upon a cash basis, and that the legislature has the power to direct the issuance of bonds at any time, so long as it does not conflict with the limitation as to the amount. *Id.*

8. IDEM—AMOUNT OF INDEBTEDNESS.—In construing the various statutes relative to the territorial indebtedness: *Held*, that the act in question does not contemplate an indebtedness in excess of that authorized by the constitution. *Id.* 195.

9. IDEM—SCHOOL FUNDS—SECTION 3, ARTICLE XI., CONSTITUTION.—Under section 3, article XI., of the constitution, the legislature is commanded to invest certain moneys received for educational purposes in United States bonds or the bonds of this state: *Held*, that the issuance of the bonds provided for in the act in question is not an evasion of the investment directed by the constitution. *Id.*

10. SECTION 10 OF ARTICLE XI. OF THE CONSTITUTION—MEANING OF "SECTARIAN PURPOSES"—HOW ASCERTAINED—RELIGIOUS SECTS.—For the purpose of ascertaining the meaning of the words "sectarian purposes" as used in the constitution, the court examined the history of the state, in relation to appropriations, as shown by the statutes and legislative journals: *Held*, that the words were used in the popular sense; that a religious sect is a body or number of persons, united in tenets, but constituting a distinct party by holding doctrines different from those of other sects, or people, and that every sect of that character is sectarian within the meaning of that word as used in the constitution. *State ex rel. Nevada Orphan Asylum* v. *Hallock*, 373.

11. IDEM—NEVADA ORPHAN ASYLUM—SECTARIAN INSTITUTION.—Upon a review of the testimony: *Held*, that the Nevada Orphan Asylum of Virginia City is a sectarian institution, and as such is prohibited by the constitution from drawing any money from the state treasury to be used for sectarian purposes. *Id.*

12. IDEM—MONEY USED FOR SECTARIAN PURPOSES.—*Held*, that if the money claimed, under the act "for the relief of the several orphan asylums of this state" (stat. 1881, 122), should be given to the Nevada orphan asylum, it would be used for the relief and support of a sectarian institu-

tion, and in part, at least, for sectarian purposes, and that it is impossible to separate this use of the money from that which might be used for other purposes that are not forbidden. *Id.*

13. SPECIAL LAW—SECTIONS 2 AND 4 OF "ACT TO DISCONTINUE LITIGATION" IN CERTAIN TAX SUITS, UNCONSTITUTIONAL.—Sections 2 and 4 of the "act to discontinue litigation touching inequitable claims for taxes and penalties" (Stat. 1879, 143), are unconstitutional, being a special law for the "collection of taxes for state, county, and township purposes" in violation of section 20, art. IV., of the constitution. *State* v. *Con. Va. M. Co.*, 432.

14. GENERAL LAW—ACT PRESCRIBING ADDITIONAL PENALTY IN TAX SUITS—CONSTITUTIONAL.—The "act prescribing an additional penalty for the non-payment of taxes in certain cases after suit" (Stat. 1873, 169), is constitutional, it being a general law imposing the same burdens upon all persons similarly situated and belonging to the same class. *Id.*

RESTRICTION UPON SALES OF OPIUM. (See Opium Act, 2.) 50.

PROVISIONS CITED.

Art.	I.	Sec.	8.	Jeopardy, 106.
Art.	I.	Sec.	14.	No imprisonment for debt, 77. Exemption of property, 423.
Art.	III.			Distribution of powers, 99.
Art.	IV.	Sec.	17.	Statute to embrace but one subject, 201.
Art.	IV.	Secs.	20–1.	Special law for collection of taxes, 438, 448.
Art.	IV.	Sec.	24.	Lotteries prohibited, 146.
Art.	IV.	Sec.	28.	Compensation of members of the legislature, 154.
Art.	IV.	Sec.	33.	Pay of officers of the legislature, 153.
Art.	V.	Sec.	21.	Board of State Prison Commissioners, 100.
Art.	VI.	Sec.	4.	Appellate jurisdiction of supreme court, 90.
Art.	IX.	Sec.	2.	Taxes to defray expenses, 204.
Art.	IX.	Sec.	3.	Bonded indebtedness, 204–6.
Art.	XI.	Sec.	2.	Sectarian instruction in public schools prohibited, 379.
Art.	XI.	Sec.	10.	Public funds not to be used for sectarian purposes, 379.
Art.	XVII.	Sec.	7.	Territorial indebtedness, 205.
Art.	XVII.	Sec.	24.	Tax for State purposes, 205.

CONSTITUTION, UNITED STATES.

JURY LAW OF THIS STATE IS NOT IN CONFLICT WITH FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. (See Jury, 1, 3.) 51.

RIGHT OF CITIZENSHIP IS NOT CONFERRED UPON CHINAMEN BY FOURTEENTH AMENDMENT. (See Citizenship, 1.) 51.

CONSTRUCTION.

CONSTITUTIONALITY OF OPIUM ACT. (See Constitution, 1.) 50.

ACT RELATING TO FUGITIVES FROM JUSTICE. (See Habeas Corpus, 1, 2.) 63.

SALARY ACT. (See Salary Act, 1.) 92.

STATE PRISON ACT. (See Constitution, 2.) 98.

SECTION 334 CRIMINAL PRACTICE ACT, CHALLENGE TO JURORS—WHEN TAKEN. (See Criminal Law, 11.) 102.

ACT RELATING TO CARE OF INSANE EMBRACES BUT ONE SUBJECT. (See Statutes, 1, 2; Constitution, 6.) 194.

SECTIONS 2 AND 3 OF ART. IX. OF THE CONSTITUTION, RELATING TO BONDED INDEBTEDNESS. (See Constitution, 7, 8.) 194.

SECTION 3 OF ART. XI., RELATING TO SCHOOL FUNDS. (See Constitution, 9.) 195.

STATUTE RELATING TO INSANE ASYLUM—AWARD OF CONTRACT TO LOWEST RESPONSIBLE BIDDER. (See Statute, 3.) 217.

BOND FOR ERECTION OF BUILDING, AND TO SAVE HARMLESS PROPERTY OWNER FROM MECHANICS' LIENS—LIABILITY OF SURETIES. (See Mechanics' Liens, 5, 6.) 328.

STATUTES RELATING TO SERVICE OF NOTICE—APPLICATION FOR COUNSEL FEES IN ACTION OF DIVORCE. (See Divorce, 1.) 363.

SECTION 10 OF ARTICLE XI. OF CONSTITUTION—MEANING OF "SECTARIAN PURPOSES." (See Constitution, 10.) 373.

"ACT RELATING TO SHERIFFS" (Stat. 1861, 104) CONSTRUED. (See Sheriff, 4–7.) 405.

CONTRACTS.

1. SPECIFIC PERFORMANCE OF CONTRACT—FAILURE TO MAKE PAYMENTS—WHEN TIME IS NOT OF THE ESSENCE OF THE CONTRACT. — Where no time is specified in the contract for the payment of the purchase money, and no penalty is imposed for default of payment, and the purchaser is allowed to enter into the possession and improve the property, and the grantor afterwards accepts the purchase money: *Held*, that the acceptance of the money was a waiver of any default in payment, and that the purchaser was entitled to a deed. *Lake* v. *Lewis*, 94.

2. IDEM—PRESUMPTIONS WHERE FINDINGS ARE SILENT.—Where the findings are silent upon the question of the time of payment, or the effect of failure to make prompt payment, or of delays or defaults of vendor or vendee, it will be presumed that time was not of the essence of the contract. In such a case it will not be held that a failure to make prompt payment created a forfeiture of the purchaser's rights. *Id.*

3. AWARD OF CONTRACT FOR ERECTION OF INSANE ASYLUM—PECUNIARY ABILITY AND SKILL OF CONTRACTOR TO BE CONSIDERED.—In deciding upon the responsibility of bidders it was the duty of the board to consider their pecuniary ability to perform the contract and to ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract. *Hoole* v. *Kinkead*, 217.

DAMAGES FOR PROPERTY DESTROYED BY FIRE—INTEREST IN PROPERTY MUST BE CERTAIN. (See Damages, 1, 2.) 44.

DUTY OF TELEGRAPH COMPANIES IN SENDING MESSAGES—DAMAGES FOR DELAY. (See Telegraph, 1–3.) 222.

BOND OF INDEMNITY TO KEEP PROPERTY OWNER HARMLESS AGAINST MECHANICS' LIENS. (See Bond, 1.) 327.

WHEN PROPERTY HOLDER CAN NOT WITHHOLD MONEY DUE CONTRACTORS WITHOUT RELEASING SURETIES. (See Mechanics' Liens, 5–7.) 328.

ACCEPTANCE OF AN OFFICE—NOT A CONTRACT. (See Office and Officer, 1.) 357.

CORPORATIONS.

1. STOCKHOLDER IN CORPORATION—WHAT CONSTITUTES.—G., sen., owned certain shares of stock in a corporation organized for the purpose of maintaining a ditch, etc.; he gave them to his son with the request that new certificates should be issued in his son's name, and transferred upon the books of the company. This request was complied with. The son paid nothing for the stock, the transfer being made in order that his son might be eligible to the office of trustee: *Held*, upon a review of the statutes of this state, that such a transaction constituted the son a stockholder in the corporation, and made him eligible to the office of trustee. (BELKNAP, J., dissenting.) *State ex rel. Rankin* v. *Leete*, 242.

2. IDEM.—Under the statutes of this state a person who "holds" shares of stock, issued in his name, is recognized as a stockholder as well as one who "owns" them. *Id.*

ACTION AGAINST TRUSTEES OF CORPORATION FOR DEFRAUDING STOCKHOLDERS—SUFFICIENCY OF COMPLAINT. (See Pleadings, 2.) 157.

LEVY OF ASSESSMENTS AND SALE OF STOCKS AFTER COMPLAINT IS FILED—FINDINGS NOT SUPPORTED BY THE PLEADINGS. (See Pleadings, 3.) 157.

SALE OF STOCK, WHEN NOT VOID. (See Stock, 1.) 157.

COSTS.

1. COST BILL.—The criminal practice act does not provide for a cost bill. The court has the power to tax the costs from an examination of the fees charged by the respective officers. *State ex rel. Quinn* v. *District Court*, 76.

HOW JUDGMENT FOR COSTS IN CASE OF ASSAULT MAY BE ENFORCED. (See Fine, 1, 2.) 76.

LEGALITY OF COSTS NOT REVIEWABLE BY CERTIORARI. (See Certiorari, 1.) 76.

SUPREME COURT HAS NO JURISDICTION ON APPEAL FROM A JUDGMENT IMPOSING COSTS FOR AN ASSAULT. (See Jurisdiction, 1.) 89.

COUNTY COMMISSIONERS.

SALARY OF COUNTY COMMISSIONERS IS REGULATED BY THE SALARY ACT. (See Salary Act, 2, 3.) 357.

COUNTY TREASURER.

EMBEZZLEMENT BY COUNTY TREASURER—SUFFICIENCY OF INDICTMENT. (See Indictment, 4.) 120.

CRIMES AND PUNISHMENTS.

Section 67. Fugitives from justice, 64.
Section 46. Imposition of fine, 77.

CRIMINAL LAW.

1. CREDIBILITY OF DEFENDANT'S TESTIMONY—INSTRUCTIONS.—The credibility of defendant's testimony in his own behalf, is to be determined in the same manner as that of any other witness. The judge should not state to the jury his estimate of a witness, or give his opinion as to the weight to be attached to his testimony. *State* v. *Johnson*, 36.
2. IDEM.—The court instructed the jury that "there is in every criminal case a greater or less temptation for a defendant to testify strongly or even falsely in his favor, and I consider that jurors should, in every instance, consider the testimony of a defendant with great caution:" *Held*, erroneous. *Id.*
3. REASONABLE DOUBT.—In giving examples as to the term "reasonable doubt," courts should confine their instructions to the well-settled rules of law. *Id.*
4. STATEMENT OF CO-DEFENDANT.—The statement of a witness relative to admissions made by the defendant O'Brien in relation to his and Johnson's participation in the robbery was admitted in evidence, with instructions that it could not be considered against the defendant Johnson, but could be considered in determining the defendant O'Brien's guilt or innocence: *Held*, that the jury could not have been misled upon this point. *Id.*
5. TESTIMONY OF DEFENDANT—INSTRUCTIONS.—The court instructed the jury, that in all cases the testimony of the defendant, in his own behalf, should be received "with great caution; for when one is being tried for a capital offense, the temptation to pervert or distort the facts in favor of himself is very great:" *Held*, erroneous. *State* v. *Vasquez*, 42.
6. VERDICT RECOMMENDING DEFENDANT TO THE MERCY OF THE COURT—DUTY OF JURY.—*Held*, that the court should have disregarded the request of the jury for instructions as to their duty in recommending the defendant to the mercy of the court. The duty of the jury is to find a verdict as to the guilt or innocence of the defendant. *Id.*
7. CERTIFICATE OF INCORPORATION—NOT READ TO THE JURY.—A certificate of incorporation of the C. P. R. R. Co. was admitted in evidence without objection. *Held*, that the defendant was not prejudiced because it was not read to the jury. *State* v. *Parker*, 79.
8. SECTION 167, CR. PR. ACT, CONSTRUED—RECOGNIZANCE—ADMISSION OF DEPOSITION.—Section 167 of the criminal practice act, as amended in 1867, does not make the taking of a recognizance a condition precedent to the admission of the deposition. *Id.*
9. SECTION 151 OF THE CR. PR. ACT CONSTRUED—WITNESS OUT OF STATE.—A deposition of a witness taken under section 151 of the criminal practice act, can not be used in evidence without proof that at the time of the trial the witness was "sick, out of the state, dead, or that his personal attendance could not be had in court." *Id.*

10. IDEM—TESTIMONY.—Testimony stated and held insufficient to show that the witness, whose deposition had been taken, was out of the state, or that his personal attendance could not have been procured. *Id.*

11. CHALLENGE TO JUROR—WHEN TAKEN—SECTION 334, CRIMINAL PRACTICE ACT, CONSTRUED.—Under the provisions of section 334 of the criminal practice act, whenever it appears from the examination of a juror, upon his *voir dire*, that he is disqualified, the challenge must be interposed before he is sworn; but these provisions have no application to a case where the disqualification or incompetency of the juror is not, without any fault of the challenging party, discovered until after the jury is completed. *State* v. *Pritchard*, 102.

12. DISCHARGE OF ONE JUROR NO NECESSITY FOR DISCHARGING JURY.—The discharge of an incompetent juror after the jury is sworn, does not create a necessity for the discharge of the eleven remaining competent jurors. *Id.*

13. CONFESSIONS—WHEN ADMISSIBLE.—A statement made by defendant to two of his bondsmen, that he was short in his accounts, at a time when he was not charged with crime, or under arrest, when no proceedings were threatened or any promise made to shield him from a criminal prosecution: *Held*, admissible in evidence. *State* v. *Carrick*, 121.

14. IDEM—WHEN NOT ADMISSIBLE.—It is only in cases where the confession is obtained by mob violence, or by threats of harm, or promises of favor, or worldly advantage held out by some person in authority, or standing in such intimate relation that the law will presume that his promises or threats will be likely to exercise such an influence over the mind of the accused as to induce him to state things that are not true, that will authorize the courts to exclude the confession or admission. *Id.*

15. INSTRUCTIONS—FORM OF VERDICT—MURDER AND MANSLAUGHTER.—The court gave a proper definition of murder in the first and second degrees, manslaughter, and justifiable homicide, and instructed the jury to designate the offense, if any, of which the defendants should be found guilty. The court gave a form of verdict for "murder in the first degree," "murder in the second degree," and "not guilty:" *Held*, that the forms were merely given as a guide to the jury, and could not be considered to limit the rights of the jury to a consideration of the defendant's guilt to the two degrees of murder, and that the jury could not have been misled by the omission of the court to give a form of verdict for manslaughter. *State* v. *St. Clair*, 207.

INDICTMENT FOR STATUTORY OFFENSE—WHEN NEGATIVE EXCEPTIONS NEED NOT BE STATED. (See Indictment, 1, 2.) 50.

FUGITIVE FROM JUSTICE. (See Habeas Corpus, 1, 2.) 63.

JUDGMENT OF FINE, IMPRISONMENT, AND COSTS FOR ASSAULT. (See Fine, 1, 2.) 76.

COST BILL NOT REQUIRED IN CRIMINAL CASES. (See Costs, 1.) 76.

OWNERSHIP OF RAILROAD CAR—SUFFICIENCY OF PROOF TO SUPPORT INDICTMENT. (See Indictment, 3.) 79.

SUPREME COURT HAS NO JURISDICTION ON APPEAL FROM A JUDGMENT IMPOSING FINE AND COSTS FOR ASSAULT. (See Jurisdiction, 1.) 89.

DISCHARGE OF JUROR AFTER JURY IS SWORN—WHEN JEOPARDY DOES NOT ATTACH. (See Jury, 4, 6.) 101.

INCOMPETENCY OF JUROR ENTERTAINING CONSCIENTIOUS SCRUPLES—CIRCUMSTANTIAL EVIDENCE. (See Jury, 5.) 101.

WHEN INSTRUCTIONS DO NOT INVADE PROVINCE OF JURY. (See Instructions, 1.) 102.

INDICTMENT FOR EMBEZZLEMENT BY COUNTY TREASURER, SUFFICIENCY OF. (See Indictment, 4.) 120.

WHEN JUROR IS NOT DISQUALIFIED BY ENTERTAINING OPINION UPON FACTS. (See Jury, 7.) 120.

DUTY OF COUNSEL TO ASK FOR INSTRUCTIONS. (See Instructions, 2.) 207.

WHEN MODIFICATION OF INSTRUCTIONS IS NOT ERRONEOUS. (See Instructions, 3.) 207.

REFUSAL OF INSTRUCTIONS ALREADY GIVEN IN SUBSTANCE, NOT ERROR. (See Instructions, 4.) 207.

CONFLICT IN AFFIDAVITS AS TO MISCONDUCT OF JURY MUST BE DETERMINED BY THE DISTRICT COURT. (See New Trial, 5.) 207.

PRESUMPTION THAT JURY WILL NOT BE INFLUENCED BY VAGUE RUMORS. (See Presumptions, 3.) 208.

INDICTMENT FOR MURDER NEED NOT CONTAIN WORDS, "WILLFUL, DELIBERATE, AND PREMEDITATED." (See Indictment, 5.) 307.

ALLOWANCE OF CHALLENGE FOR IMPLIED BIAS IS NOT REVIEWABLE. (See Jury, 8.) 307.

CREDIBILITY OF WITNESSES. (See Instruction, 5.) 307.

CRIMINAL PRACTICE ACT.

Section 151. Deposition in criminal case, 83.
Section 167. Recognizance in criminal case, 82.
Sections 234–5. Indictment, 124.
Section 334. Challenge to jurors, 113.
Section 340. Qualification of jurors, 108, 126.
Sections 396–7. Discharge of Jury, 109.
Section 433. Disallowance of challenge to jurors, 309.
Sections 651–3. Fugitives from justice, 64.
Section 674. Judgment for costs, 77.

DAMAGES.

1. DAMAGES FOR BREACH OF CONTRACT—PRIVITY—PROPERTY DESTROYED BY FIRE.—The owner of property which is destroyed by fire, can not maintain an action to recover damages from a water company, on the ground that the property was destroyed by the failure of the water company to furnish a supply of water as required by the terms of its contract with the town, there being no privity of contract between the parties to the action. *Ferris* v. *Carson Water Co.*, 44.
2. INTEREST IN PROPERTY MUST BE CERTAIN AND SUBSTANTIAL.—The owner of property destroyed by fire, upon assignment, sought to recover

damages upon the ground that the municipality had such an interest in the property as to give it a right of action: *Held*, that the right of taxation vested in the municipality did not create an interest in the property but only an expectation dependent upon contingencies, and that this was too remote to be the foundation of a right of action. *Id.*

DAMAGES AGAINST TELEGRAPH COMPANY FOR DELAY IN SENDING MESSAGE. (See Telegraph, 1–3.) 222.

SURETY ON OFFICIAL BOND CAN NOT RECOVER FULL DAMAGES FROM CO-SURETIES. (See Sureties, 1.) 298.

NOMINAL DAMAGES—WHEN INJUNCTION SHOULD ISSUE IN ACTION FOR DIVERSION OF WATER. (See Water Rights, 1, 2.) 311.

DECLARATIONS.

WHEN DECLARATIONS OF AN AGENT ARE INADMISSIBLE IN EVIDENCE. (See Evidence, 7.) 341.

DEED.

1. EJECTMENT—QUITCLAIM DEED—WHEN IT CONVEYS GRANTOR'S TITLE ACQUIRED BY SUBSEQUENT PATENT—NONSUIT.—C., after making final proof and payment in United States land office of the land in controversy, and receiving a duplicate receipt therefor, conveyed the same, by quitclaim deed, to B. and R., C. subsequent to this conveyance received from the United States government a patent to the land: *Held*, that, by his patent, C. acquired no right or interest in the land in question which he did not possess at the date of his deed to B. and R.; and that, upon the motion for nonsuit, plaintiff's rights should have been considered the same as they would have been if C.'s deed had been a bargain and sale deed, or if it had been executed subsequent to the date of the patent. *Brown* v. *Warren*, 229.

2. DESCRIPTION IN DEED—PAROL EVIDENCE OF IDENTITY.—A description in a deed conveying "all the real estate, water rights, and property of every description, real and personal, in the state of Nevada, belonging to the first parties of the first, or either of them," is sufficient to convey the title. Parol evidence is admissible to enable an identification of the property to be made. *Id.*

3. DEED—RECORDING OF SEAL NOT NECESSARY—WHEN ENSEALING WILL BE PRESUMED.—The recording of the seal to a deed is not absolutely essential. If the original instrument can not be produced, and the record thereof is offered in evidence, the existence of the seal will be presumed from the statement in the deed that the grantor did set his hand and affix his seal thereto, and from the attestation clause that it was signed, sealed, and delivered in the presence of witnesses. *Flowery M. Co.* v. *North Bonanza M. Co.*, 302.

WHEN DEED IS INADMISSIBLE IN EVIDENCE IN ACTION OF FORCIBLE ENTRY AND UNLAWFUL DETAINER. (See Forcible Entry and Unlawful Detainer, 1.) 154.

DEFINITION.

MEANING OF WORDS "LOWEST RESPONSIBLE BIDDER"—CONTRACT FOR ERECTION OF INSANE ASYLUM. (See Statute, 3.) 217.

"STOCKHOLDER" IN CORPORATION. (See Corporation, 1, 2.) 242.

MEANING OF "WILLFUL, DELIBERATE, AND PREMEDITATED" IN INDICTMENT FOR MURDER. (See Indictment, 5.) 307.

MEANING OF "SECTARIAN PURPOSES" AS USED IN SECTION 10 OF ART. XI. OF THE CONSTITUTION. (See Constitution, 10–12.) 373.

MEANING OF "TEAMSTER" IN STATUTE EXEMPTING PROPERTY FROM EXECUTION. (See Execution, 1, 2.) 416.

DEMURRER.

DEMURRER FOR NON JOINDER OF PARTIES—WHEN WAIVED. (See Pleadings, 5.) 271.

DEPOSITION.

RECOGNIZANCE, WHEN NOT A CONDITION PRECEDENT TO ADMISSION OF DEPOSITION IN A CRIMINAL CASE. (See Criminal Law, 8.) 79.

DEPOSITION OF WITNESS UNDER SECTION 151 OF THE CRIMINAL PRACTICE ACT—WITNESS OUT OF THE STATE. (See Criminal Law, 9.) 79.

DIVORCE.

1. DIVORCE—APPLICATION FOR COUNSEL FEES—NOTICE MUST BE SERVED UPON ATTORNEY.—In an action for divorce, the notice of application for the allowance of counsel fees must, under the provisions of the statute, be served upon the attorney (if there is one), instead of the party. *Lake* v. *Lake*, 363.

2. IDEM—WHERE NOTICE HAS ACCOMPLISHED ITS PURPOSE, ERROR NOT PREJUDICIAL.—Where a notice served upon the party accomplished its purpose in bringing the attorney into court, and he stated that he was prepared to proceed with the hearing, subject to the objection that the notice was not served upon him, and the court ruled that the notice was sufficient: *Held*, that the ruling was technically erroneous, but as it did not prejudice the defendant, the error should be disregarded. *Id.*

3. ALLOWANCE OF COUNSEL FEES, WHEN MAY BE MADE.—The power of the court to make an allowance of counsel fees, while the cause is pending, is incident to divorce suits, and may be made as often as the circumstances of the case may require. *Id.* 364.

4. IDEM—AFTER DIVORCE IS GRANTED.—Where the wife obtained a decree of divorce, and the court adjudged a large estate, claimed by her as community property, to be the separate property of the husband, and awarded it all to him: *Held*, that the court was justified in making an allowance of counsel fees to enable her to proceed further and contest the question relating to the property, it appearing that such proceedings were contemplated in good faith. *Id.*

5. APPEAL—WHEN ALLOWANCE OF COUNSEL FEES WILL BE GRANTED BY THE SUPREME COURT.—Where the husband appeals from an order of the district court allowing counsel fees to the wife, the supreme court has the power to make an allowance of counsel fees to the wife, so as to enable her to appear, by counsel, in the supreme court upon such appeal. *Id.*

WHEN JUDGMENT IN DIVORCE SUIT IS NOT FINAL. (See Judgment, 2.) 215.

EJECTMENT.

1. ONE TENANT IN COMMON MAY MAINTAIN EJECTMENT AGAINST EVERY ONE BUT A CO-TENANT.—A tenant in common who has an interest in the property which entitles him to the enjoyment of the entire estate, can maintain ejectment against all persons but his co-tenants and parties claiming under them. *Brown* v. *Warren*, 229.

A NONSUIT SHOULD NOT BE GRANTED IF THERE IS ANY EVIDENCE TO AUTHORIZE A RECOVERY. (See Nonsuit, 1.) 229.

WHEN QUITCLAIM DEED CONVEYS GRANTOR'S TITLE ACQUIRED BY SUBSEQUENT PATENT. (See Deed, 1.) 229.

PATENT TO SURFACE GROUND OF MINING CLAIM—EFFECT OF. (See Patent, 1.) 361.

ELECTION.

ELECTION OF OFFICERS OF A CORPORATION—STOCKHOLDERS ENTITED TO VOTE. (See Corporation, 1, 2.) 242.

EMBEZZLEMENT.

EMBEZZLEMENT BY COUNTY TREASURER—SUFFICIENCY OF INDICTMENT. (See Indictment, 4.) 120.

EQUITY.

1. EQUITABLE RELIEF—NEGLIGENCE.—Courts of equity will not grant relief to a party who has had an opportunity to be heard in a court of law without a showing that he was prevented from being heard by the wrongful acts of the prevailing party, unmixed with any negligence or fault on his part. *Royce* v. *Hampton*, 25.

2. MISREPRESENTATIONS.—Courts of equity will not grant relief to a party upon the ground of misrepresentations made to him, unless he shows that he relied and acted upon them believing them to be true. *Id.*

ERROR.

1. PARTIES TO SUIT—HUSBAND OF ADMINISTRATRIX—UNPREJUDICIAL ERROR. *Held*, that even if the court technically erred in refusing to make the husband of the administratrix a party defendant, it was an error that did not prejudice the rights of the plaintiff. *Buckley* v. *Buckley*, 180.

CERTIFICATE OF INCORPORATION NOT READ TO THE JURY—NOT PREJUDICIAL ERROR. (See Criminal Law, 7.) 79.

MODIFICATION OF INSTRUCTIONS—NOT ERROR. (See Instructions, 3.) 207.

REFUSAL OF INSTRUCTIONS ALREADY GIVEN IN SUBSTANCE IS NOT ERROR. (See Instructions, 4.) 207.

SUFFICIENCY OF SPECIFICATION OF ERROR IN STATEMENT ON APPEAL FROM A JUDGMENT OF NONSUIT. (See Statement, 6.) 228.

WHERE NOTICE HAS ACCOMPLISHED ITS PURPOSE, THE ERROR IN SERVING WRONG PARTY IS NOT PREJUDICIAL. (See Divorce, 2.) 363.

WHO CAN TAKE ADVANTAGE OF MISTAKE IN ORIGINAL COMPLAINT. (See Pleadings, 7.) 388.

ESTATES OF DECEASED PERSONS.

1. DECREE OF DISTRIBUTION—LACHES OF CLAIMANT—POVERTY NO EXCUSE. Where a claimant has knowledge of the proceedings for the settlement of an estate, of the time fixed for a decree of distribution, that the estate is valuable, that his claim of relationship is denied, that the administrator failed to answer his letters, and where all the proceedings were regular and legal in form and without any fraud, concealment, or misrepresentation: *Held*, that the fact that the claimant was in delicate health and in poor circumstances is not sufficient to excuse him from making an effort to appear in the proceedings and assert his rights. *Royce* v. *Hampton*, 25.

2. DUTY OF ADMINISTRATORS.—Administrators should be held to the utmost good faith and strict performance of official duty. They are, however, mere creatures of the statute, and are only bound to perform such duties as are imposed upon them by the law. *Id.*

3. IDEM.—Where the decree of distribution is not made upon the petition of the administrator, he is not bound to notify the court that there are other parties, besides the petitioner, who claim to be heirs of the estate. *Id.*

4. DUTY OF PETITIONER.—It is the duty of the petitioner for a decree of distribution to inform the court as to all heirs of the estate entitled to share in the distribution thereof; but when petitioner claims to be the sole heir of the estate, and regularly pursues the course required by the statute in giving notice, etc., he is not guilty of fraud upon the court, because he does not state the names of other parties who claim to be heirs of the estate. *Id.*

EFFECT OF MARRIAGE OF ADMINISTRATRIX OF ESTATE. (See Marriage, 1, 2.) 180.

HUSBAND NOT MADE PARTY TO SUIT—WHEN ERROR IS NOT PREJUDICIAL. (See Error, 1.) 180.

ESTOPPEL.

TRANFER OF CERTIFICATES OF MINING STOCK—WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING TITLE. (See Stock, 2, 3.) 185.

WHEN ONE PARTNER IS ESTOPPED FROM DENYING THE INTERESTS OF OTHERS IN MINING GROUND. (See Mining Claims, 4.) 325.

EVIDENCE.

1. SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.—The evidence reviewed and held to be sufficient to support the findings that plaintiff "was guilty of negligence and laches which are unexcused." *Royce* v. *Hampton*, 26.

2. SUFFICIENCY OF EVIDENCE.—*Held*, that there was some evidence to sustain the verdict of the jury. *State* v. *Ah Chew*, 51.

3. BOOKS OF ACCOUNT—WHEN ADMISSIBLE IN EVIDENCE.—A memorandum book kept by the deceased, which was shown to be principally in his handwriting, and the entries made about the time when the transactions occurred, and the book one by which the deceased settled with parties with whom he had business: *Held*, admissible in evidence. *Buckley* v. *Buckley*, 180.

4. CERTIFICATE OF REGISTER OF LAND OFFICE—EVIDENCE OF CONVEYANCE OF LAND.—A certificate of the register of the land office containing a copy of all the entries, as to pre-emption, settlement, payment of purchase money, and issuance of patent, that appeared in the books of the land office, in relation to the lands in question, is competent evidence of the facts intended to be proven thereby. *Brown* v. *Warren*, 229.

5. CONFLICT OF EVIDENCE—WHETHER PLAINTIFFS COULD HAVE SEEN THE TRAIN.—Upon a review of the testimony, in response to petition for rehearing: *Held*, that there was a conflict of testimony as to whether the plaintiffs might have seen the train of the defendant had they looked, and might have heard the train of the defendant had they listened. *Bunting* v. *C. P. R. R. Co.*, 278.

6. IDEM—REASONABLE CARE.—The question for the jury and court to decide was not "whether the plaintiffs might have seen the train of the defendant had they looked" at some particular point, but whether, under all the facts and circumstances testified to in this case, they made reasonable efforts to see and hear the approaching train, and, in this respect, exercised the due care and caution which the law requires. *Id.*

7. DECLARATIONS OF AN AGENT—WHEN INADMISSIBLE IN EVIDENCE.—The declarations of an agent in charge of a station and warehouse belonging to the defendant, at the time the goods of plaintiff and his assignors were burned therein, as to what occasioned the fire: *Held*, upon the facts stated in the opinion, inadmissible in evidence. *Meyer* v. *V. & T. R. R. Co.*, 341.

8. PAROL AGREEMENT TO CONVEY LAND—WHEN EVIDENCE TO PROVE IS IRRELEVANT—PURCHASE OF TREES AND SHRUBS.—Defendant sought to prove a parol agreement upon the part of plaintiff to convey certain lands upon the issuance to him of a patent, and, for that purpose, offered to show that while he was in possession of the land the plaintiff purchased from him some fruit-trees and shrubs growing upon the land and caused them to be removed therefrom: *Held*, that this evidence was disconnected with the question relative to the agreement; that it did not tend to establish its existence, and that it was properly refused. *Treadway* v. *Wilder*, 354.

ADMISSIBILITY OF STATEMENT OF CO-DEFENDANT. (See Criminal Law, 4.) 36.

DEPOSITION OF WITNESS UNDER SECTION 151 OF THE CRIMINAL PRACTICE ACT—WITNESS OUT OF THE STATE. (See Criminal Law, 9.) 79.

OWNERSHIP OF RAILROAD CAR—SUFFICIENCY OF PROOF TO SUPPORT INDICTMENT. (See Indictment, 3.) 79.

MATERIALITY OF NEWLY DISCOVERED EVIDENCE—WHEN TESTIMONY IS NOT CUMULATIVE. (See New Trial, 1, 2.) 131.

CONFLICT IN AFFIDAVITS AS TO MISCONDUCT OF JURORS MUST BE DETERMINED BY THE DISTRICT COURT. (See New Trial, 5.) 207.

A NONSUIT SHOULD NOT BE GRANTED IF THERE IS ANY EVIDENCE TO AUTHORIZE A RECOVERY. (See Nonsuit, 1.) 229.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW IDENTITY OF LAND WITH DESCRIPTION IN THE DEED. (See Deed, 2.) 229.

AUTHORITY OF AGENT TO MAKE A COMPROMISE OF INTEREST IN MINING GROUND—WHEN IMMATERIAL. (See Mining Claims, 1.) 260.

HOW INTERESTS OF PARTIES IN MINING GROUND MAY BE DETERMINED. (See Mining Claims, 2.) 260.

ASSESSMENT BOOK IS ADMISSIBLE IN EVIDENCE TO DETERMINE INTEREST OF PARTIES IN MINING GROUND. (See Mining Claims, 3.) 261.

PRESUMPTIONS WHERE RECORD DOES NOT CONTAIN ALL THE EVIDENCE. (See Presumptions, 4.) 271.

NEGATIVE AND POSITIVE EVIDENCE AS TO WHETHER SIGNALS ARE GIVEN BY RAILROAD COMPANY—CONFLICT OF EVIDENCE. (See Negligence, 1.) 277.

CONTRIBUTORY NEGLIGENCE. (See Negligence, 2, 3.) 277.

DUTY OF RAILROAD COMPANY TO STOP ITS TRAIN IN CASE OF GREAT PERIL. (See Railroads, 1.) 278.

PATENT TO SURFACE GROUND OF MINING CLAIM—WHEN NONSUIT SHOULD NOT BE GRANTED. (See Patent, 1.) 361.

"ACT RELATING TO SHERIFFS" (STATS. 1861, 104)—EVIDENCE AS TO PAYMENT OF MONEY TO SHERIFF AFTER RETURN DAY OF EXECUTION. (See Sheriff, 4–7.) 405.

EXECUTION.

1. PROPERTY EXEMPT FROM EXECUTION—TEAMSTER.—The court instructed the jury that, "To be a teamster, within the meaning of the law and of the statute concerning exemptions, a man need not necessarily drive his team. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family—if he has one:" *Held*, correct. *Elder* v. *Williams*, 416.

2. IDEM—SELECTION OF PROPERTY.—The court instructed the jury that, "If a teamster owns more than one team, that is, if he owns more than two horses or mules, and their necessary harness and equipments, and more than one wagon, it is his right and privilege under the law to select and designate two animals and their harness, etc., and one wagon, *suitable for use* therewith, or with two animals, as his exempt property, and when so selected and pointed out, the law will recognize and protect them as his exempt property, provided they were actually in use by such teamster in his business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected:" *Held*, correct. *Id.*

3. FRAUDULENT CONCEALMENT OF OTHER PROPERTY—NOT DEPRIVATION OF RIGHTS UNDER EXEMPTION LAWS.—If plaintiff fraudulently concealed other property and refused to surrender the same in execution, equal in amount to the value of the property claimed as exempt, that fact does not deprive him of an otherwise valid claim of exemption. *Id.* 417.

EXECUTION SALE—WHEN MONEY IS RECEIVED BY THE SHERIFF IN HIS OFFICIAL CAPACITY. (See Sheriff, 1.) 404.

PAYMENT OF MONEY TO SHERIFF AFTER RETURN DAY OF EXECUTION. (See Sheriff, 6.) 405.

EXEMPTION.

PROPERTY EXEMPT FROM EXECUTION BY A TEAMSTER. (See Execution, 1, 2.) 416.

FRAUDULENT CONCEALMENT OF OTHER PROPERTY IS NOT DEPRIVATION OF RIGHTS UNDER EXEMPTION LAWS. (See Execution, 3.) 417.

FEES.

WHEN ALLOWANCE OF COUNSEL FEES, IN AN ACTION OF DIVORCE, MAY BE MADE. (See Divorce, 3–5.) 364.

SHERIFF'S EXPENSES IN TAKING CHARGE OF PERSONAL PROPERTY MUST BE CERTIFIED TO BY DISTRICT JUDGE. (See Sheriff, 3.) 404.

FINAL JUDGMENT.

WHEN JUDGMENT IN DIVORCE SUIT IS NOT FINAL. (See Judgment, 2.) 215.

FINDINGS.

1. FINDINGS MUST BE EMBODIED IN STATEMENT.—The findings of the district court will not be considered upon appeal unless they are embodied in the statement. *Nesbitt* v. *Chisholm*, 39.

2. FINDINGS OF FACT—GENERAL AND SPECIAL VERDICT.—The findings of fact by a court or referee are like the special verdict of a jury; and the conclusions of law drawn therefrom are similar to a general verdict in a case wherein the jury have found a general and special verdict. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 156.

SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS. (See Evidence, 1.) 26.

PRESUMPTIONS IN FAVOR OF FINDINGS. (See Presumptions, 1.) 39.

PRESUMPTIONS WHEN FINDINGS ARE SILENT AS TO WHETHER TIME IS OF THE ESSENCE OF A CONTRACT. (See Contract, 2.) 94.

FINDINGS ARE AGAINST LAW IF INCONSISTENT WITH THE ISSUES MADE BY THE PLEADINGS. (See New Trial, 4.) 157.

FINDINGS NOT SUPPORTED BY THE PLEADINGS AS TO LEVY OF ASSESSMENTS AND SALE OF STOCKS AFTER COMPLAINT IS FILED. (See Pleadings, 3.) 157.

AMENDMENT OF COMPLAINT AFTER FINDINGS ARE MADE, WHEN NOT ALLOWABLE. (See Pleadings, 4.) 157.

FINDINGS OF JURY UPON SPECIAL ISSUES. (See Presumptions, 5.) 354.

FINE.

1. ASSAULT—FINE AND IMPRISONMENT—COSTS.—Relator was convicted of an assault. The judgment imposed a fine of five hundred dollars, taxed the costs at three hundred dollars and fifty cents, and ordered relator to be imprisoned, as by statute provided, for the fine: *Held*, that section 46 of the act concerning crimes and punishments (1 Comp. L. 2352), authorized the imposition of the fine, and section 674 of the criminal prac-

tice act (Id. 2299) authorized the judgment for costs. *State ex rel. Quinn* v. *District Court*, 76.

2. IDEM—JUDGMENT, HOW ENFORCED.—Relator could be imprisoned for the fine. The judgment for costs can be enforced only by execution. *Id.*

SUPREME COURT HAS NO JURISDICTION ON APPEAL FROM A JUDGMENT IMPOSING A FINE FOR ASSAULT. (See Jurisdiction, 1.) 89.

FORCIBLE ENTRY AND UNLAWFUL DETAINER

1. FORCIBLE ENTRY AND UNLAWFUL DETAINER—RIGHT OF POSSESSION NOT INVOLVED—ADMISSION OF DEEDS ERRONEOUS.—In an action of forcible entry and unlawful detainer, neither title nor right of possession being involved, it is erroneous to admit quitclaim deeds in evidence, as tending to show possession. *Lachman* v. *Barnett*, 154.

FORMER JUDGMENT.

WHEN FORMER JUDGMENT IS RES JUDICATA. (See Judgment, 3.) 311.

FRAUD.

WHEN ADMINISTRATOR IS NOT GUILTY OF FRAUD IN SETTLEMENT OF ESTATE. (See Estates of Deceased Persons, 1–4.) 25.

ACTION AGAINST TRUSTEES OF CORPORATION FOR DEFRAUDING STOCKHOLDERS —SUFFICIENCY OF COMPLAINT. (See Pleadings, 2.) 157.

FRAUDULENT SALE—WHEN INSTRUCTIONS MAY BE MISLEADING. (See Instructions, 10.) 369.

ATTACHMENT UPON ACCOUNT STATED FOR GREATER AMOUNT THAN IS ACTUALLY DUE—WHEN NOT CONSTRUCTIVE FRAUD. (See Attachment, 1.) 388.

FRAUDULENT CONCEALMENT OF OTHER PROPERTY IS NOT DEPRIVATION OF RIGHTS UNDER EXEMPTION LAWS. (See Execution, 3.) 417.

FUGITIVE FROM JUSTICE.

See HABEAS CORPUS.

HABEAS CORPUS.

1. FUGITIVE FROM JUSTICE.—To hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state: 1. That a crime has been committed in the other state. 2. That the accused has been charged in that state with the commission of such crime. 3. That he has fled from justice, and is within this state. (1 Comp. L., 2278–2286.) *Ex parte Lorraine*, 63.

2. IDEM—PROPERTY BROUGHT INTO THIS STATE.—To hold a fugitive from justice, upon the ground that the money taken by him, in committing a robbery, was brought into this state, there must be a complaint charging him with this offense substantially in the language of the statute. *Id.*

INDICTMENT.

1. STATUTORY OFFENSE—NEGATIVE EXCEPTIONS.—In an indictment for a statutory offense, it is only necessary to state the negative to an exception to the statute, when the exception is such as to render the negative of it an essential part of the definition or description of the offense charged. *State* v. *Ah Chew*, 50.

2. IDEM.—It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not. *Id.*

3. OWNERSHIP OF RAILROAD CAR—SUFFICIENCY OF PROOF TO SUPPORT INDICTMENT.—Testimony was given that the car, which the defendant was charged with burglariously entering, was upon the track of the C. P. R. R. Co., attached to its train, and in its possession, occupancy, and control: *Held*, that the ownership of the car was properly laid in the C. P. R. R. Co., although the legal title was in another. *State* v. *Parker*, 79.

4. EMBEZZLEMENT—COUNTY TREASURER—SUFFICIENCY OF INDICTMENT—PROOF.—In an indictment against a county treasurer for embezzlement, it is sufficient to allege and prove the felonious conversion to his own use of any money that came into his possession, or was under his control by virtue of his office, without specifying with certainty the particular kind of funds embezzled, or the particular time when the money was received. *State* v. *Carrick*, 120.

5. INDICTMENT FOR MURDER—WILLFUL, DELIBERATE, AND PREMEDITATED—MALICE AFORETHOUGHT.—In reviewing an indictment for murder: *Held*, that charging the homicide to have been with "malice aforethought" is tantamount to an averment that the act was "willful, deliberate, and premeditated." *State* v. *Hing*, 307.

INJUNCTION.

WHEN INJUNCTION SHOULD ISSUE IN ACTION FOR DIVERSION OF WATER—NOMINAL DAMAGES—PRESENT USE OF WATER. (See Water Rights, 1, 2.) 311.

INSANE ASYLUM.

ACT IN RELATION TO CARE OF INSANE EMBRACES BUT ONE SUBJECT. (See Statutes, 1, 2.) 194.

AWARDING CONTRACT FOR ERECTION OF INSANE ASYLUM TO LOWEST RESPONSIBLE BIDDER. (See Statutes, 3.) 217.

PECUNIARY ABILITY AND SKILL OF CONTRACTOR TO BE CONSIDERED IN AWARDING CONTRACT. (See Contract, 3.) 217.

INSTRUCTIONS.

1. PROVINCE OF JURY.—Where all the facts are agreed upon by counsel, and the only question is, whether, upon the agreed facts, the defendant had been in jeopardy: *Held*, that the court did not invade the province of the jury by giving an instruction, that there was no evidence to sustain a plea of former jeopardy. *State* v. *Pritchard*, 102.

2. FORM OF VERDICT—DUTY OF COUNSEL TO ASK FOR INSTRUCTIONS.—If counsel considered it important that a form of verdict for manslaughter should be given, it was their duty to prepare the same or request the court to give it. *State* v. *St. Clair*, 207.

3. MODIFICATION OF INSTRUCTIONS.—*Held*, upon review of the instructions, stated in the facts of this case, that the modification made by the court could not have misled the jury to the prejudice of the defendant. *Id.*

4. REFUSAL OF INSTRUCTIONS ALREADY GIVEN IN SUBSTANCE—NOT ERROR. It is not error to refuse instructions asked by defendant when the court of its own motion gave proper instructions upon the subject-matter embraced therein. *Id.*

5. CREDIBILITY OF WITNESSES.—In reviewing an instruction relative to the credibility of a witness jointly indicted with defendant: *Held*, that the attention of the jury may be directed to the peculiar circumstances surrounding any witness that are proper to be considered in determining the weight to be attached to his testimony. *State* v. *Hing*, 307.

6. OMISSION TO GIVE INSTRUCTIONS.—The omission of the court to instruct a jury upon any particular point, when the same is not definitely requested, is not the subject of an exception. *Id.*

7. INSTRUCTIONS—REFUSAL OF, WHEN WILL BE SUSTAINED.—Where the record on appeal fails to show that an instruction was applicable to the evidence, the action of the court in refusing it will be sustained even if the reason given by the court for its refusal was not sufficient. *Meyer* v. *V. & T. R. R. Co.*, 341.

8. IDEM—NOT PERTINENT TO ISSUES.—Instructions that are not pertinent to any issues in the case should be refused, although they embody correct propositions of law in the abstract. *Id.*

9. IDEM—REPETITION OF, WHEN NOT PREJUDICIAL.—Plaintiff complained of an instruction given by the court of its own motion: *Held*, that even if it was erroneous it could have done no harm to plaintiff, because it was but a repetition, in substance, of one given at his request. *Id.*

10. FRAUDULENT SALE—INSTRUCTION—WHEN MAY BE MISLEADING.—The court gave an instruction correctly stating the various facts and circumstances that might be considered by the jury in determining whether the sale of personal property was fraudulent; but, after the separate statement of each fact, the court repeated the words: "And the jury are at liberty to find that the sale was fraudulent and find for the defendant:" *Held*, that by this repetition the jury may have been misled into the belief that if any of the facts mentioned as tending to prove fraud existed, they would be justified in finding a verdict for defendant independently of the other facts of the case, and that such a construction would be prejudicial to the defendant. *Mendes* v. *Kyle*, 369.

CREDIBILITY OF DEFENDANT'S TESTIMONY. (See Criminal Law, 1, 2, 5.) 36.

VERDICT RECOMMENDING DEFENDANT TO THE MERCY OF THE COURT. (See Criminal Law, 6.) 42.

INSTRUCTIONS AS TO FORM OF VERDICT—WHEN JURY NOT MISLED. (See Criminal Law, 15.) 207.

HOW INTEREST OF PARTIES IN MINING GROUND MAY BE DETERMINED. (See Mining Claim, 2.) 260.

CONTRIBUTORY NEGLIGENCE. (See Negligence, 2, 3.) 277.

INTERVENOR.

1. RIGHTS OF INTERVENOR—ANSWER.—Where the answer to a complaint is treated, upon the trial, as the answer to the petition for intervention, the case will be considered the same as if an answer to the petition had been filed. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 156.

2. IDEM—RELIEF GRANTED.—In such a case defendants can not complain because the relief granted exceeded the demand in the petition, if that which was granted was consistent with the case made, and was embraced within the issue. *Id.*

AMENDMENT OF COMPLAINT UPON ACCOUNT STATED—EFFECT OF UPON ATTACHMENT OF SUBSEQUENT INTERVENING CREDITORS. (See Pleadings, 6–9.) 388.

JEOPARDY.

DISCHARGE OF ONE JUROR, AFTER THE JURY IS SWORN, AND IMPANELMENT OF ANOTHER JUROR—WHEN JEOPARDY DOES NOT ATTACH. (See Jury, 4, 6.) 101.

JUDGE.

WHEN STATEMENT ON MOTION FOR NEW TRIAL MAY BE SETTLED BY THE JUDGE OR REFEREE. (See Statement, 5.) 156.

JUDGMENT.

1. JUDGMENT MUST CONFORM TO THE ISSUES.—A judgment must accord with, and be sustained by, the pleadings of the party in whose favor it is rendered, and no court, jury, or referee has any authority to find a fact or draw therefrom a legal conclusion which is outside of the issues. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 156.

2. FINAL JUDGMENT—DIVORCE—APPEAL.—In an action for divorce, brought by Jane Lake against relator, the court, upon special issues of fact found by a jury, ordered that the bonds of matrimony existing between the parties be dissolved, and reserved from its decision the question of the division of the common property, and the question of the custody of their child: *Held*, that the judgment ordered by the court was not a final judgment in the case, and that no appeal could be taken from the orders made thereafter for alimony, and for counsel fees. *Lake* v. *King*, 215.

3. FORMER JUDGMENT—RES JUDICATA.—Where a former judgment has established the rights of the respective parties to the waters of a stream, the same question as between the same parties can not again be considered; it is *res judicata*. *Brown* v. *Ashley*, 311.

4. JUDGMENT—WHEN, AND HOW, MAY BE SET ASIDE—JURISDICTION—STATUTE.—The manner of vacating judgments is regulated by statute, and the statutory provisions must be complied with, in order to authorize the court to act. The court has no jurisdiction to set aside a judgment upon a mere motion. *State ex rel. Smith* v. *District Court*, 371.

PRESUMPTION IN FAVOR OF JUDGMENT. (See Presumptions, 1.) 39.

JUDGMENT OF FINE AND IMPRISONMENT, AND FOR COSTS, IS AUTHORIZED BY STATUTE—HOW ENFORCED. (See Fine, 1, 2.) 76.

SUPREME COURT HAS NO JURISDICTION ON APPEAL FROM A JUDGMENT IMPOSING A FINE AND COSTS FOR AN ASSAULT. (See Jurisdiction, 1.) 89.

JUDGMENT OF NONSUIT—SUFFICIENCY OF SPECIFICATION OF ERROR IN STATEMENT ON APPEAL. (See Statement, 6.) 228.

WHEN PENDENCY OF APPEAL DOES NOT SUSPEND OPERATION OF JUDGMENT. (See Appeal, 3.) 426.

JURISDICTION

1. ASSAULT—JURISDICTION OF SUPREME COURT ON APPEAL.—Defendant was indicted for the crime of an assault with intent to kill, and was tried and found "guilty of an assault." The judgment imposed a fine of five hundred dollars, and taxed the costs against defendant. From this judgment an appeal was taken. *Held*, that this court had no jurisdiction. Appeal dismissed. *State* v. *McCormick*, 14 Nev. 347, affirmed. (Belknap, J., dissenting.) *State* v. *Quinn*, 89.

LEGALITY OF COSTS IS NOT REVIEWABLE BY CERTIORARI. (See Certiorari, 1.) 76.

WHEN, AND HOW, JUDGMENTS MAY BE SET ASIDE. (See Judgment, 4.) 371.

JURY.

1. JURY LAW—FOURTEENTH AMENDMENT—TREATY WITH CHINA.—The jury law of this state does not conflict with the fourteenth amendment of the constitution of the United States, or with sections 1977, 1978, Rev. Stat. U. S., or with article 6 of the treaty between the United States and China of July 28, 1868. *State* v. *Ah Chew*, 51.
2. CITIZENS MAY BE EXCLUDED AS JURORS.—The privilege, or duty, of being a juror is not always an incident of citizenship. *Id.*
3. IDEM—EQUAL PROTECTION TO PERSONS.—The state has the right to prescribe the qualifications of its jurors, provided it does not discriminate against persons because of their race or color. A mixed jury in a particular case is not essential to the equal protection of the law, and is not guaranteed by the fourteenth amendment to the constitution of the United States. *Id.*
4. DISCHARGE OF JUROR AFTER JURY IS SWORN—IMPANELMENT OF ANOTHER JUROR—FORMER JEOPARDY.—Where the incompetency of a juror was first made known to the court after the juror was sworn and the jury completed: *Held*, that, upon the facts stated in the opinion, the court was authorized to then discharge the juror, and to impanel another juror in his stead, and that these facts furnished no evidence to support defendant's plea of former jeopardy. *State* v. *Pritchard*, 101.
5. INCOMPETENCY OF JUROR—CONSCIENTIOUS SCRUPLES—CIRCUMSTANTIAL EVIDENCE.—A juror who states that he would not convict a defendant, in a capital case, on circumstantial evidence, is an incompetent juror. *Id.*
6. DISCHARGE OF JUROR, NECESSITY FOR, AFTER JURY IS SWORN.—Courts are legally authorized to discharge a juror or a jury, after the jury has been sworn to try the case, whenever, from any cause, such a necessity exists as to make it apparent that the ends of justice would otherwise be defeated. *Id.*

7. CHALLENGE TO JUROR—OPINION UPON FACTS—WHEN NOT DISQUALIFIED. A juror stated that he had an unqualified opinion that there was a deficiency in the accounts of the defendant, as county treasurer, but had no opinion as to defendant's guilt or innocence: *Held*, that a challenge to the juror, for implied bias, was properly disallowed. *State* v. *Carrick*, 120.

8. ALLOWANCE OF CHALLENGE FOR IMPLIED BIAS—NOT SUBJECT OF REVIEW.—The allowance of a challenge for implied bias is not the subject of an exception. *State* v. *Hing*, 307.

9. GENERAL OR PARTICULAR CAUSE OF CHALLENGE—CONSCIENTIOUS OPINIONS.—A juror was excused upon the ground that he entertained such conscientious opinions concerning capital punishment as would preclude his finding defendant guilty of an offense punishable with death: *Held*, that the objection to the juror did not go to the general cause of challenge; that he was disqualified from serving in any case, but to the particular cause, that he was disqualified from serving on the case on trial. *Id.*

VERDICT RECOMMENDING JURY TO THE MERCY OF THE COURT. (See Criminal Law, 6.) 42.

CHALLENGE TO JUROR—WHEN MAY BE TAKEN. (See Criminal Law, 11.) 102.

DISCHARGE OF ONE JUROR—WHEN NO NECESSITY FOR DISCHARGE OF JURY. (See Criminal Law, 12.) 102.

WHEN INSTRUCTIONS DO NOT INVADE PROVINCE OF A JURY. (See Instructions, 1.) 102.

INSTRUCTIONS AS TO FORM OF VERDICT—WHEN JURY IS NOT MISLED. (See Criminal Law, 15.) 207.

CONFLICT IN AFFIDAVITS AS TO MISCONDUCT OF JURY MUST BE DETERMINED IN DISTRICT COURT. (See New Trial, 5.) 207.

PRESUMPTIONS THAT JURY WILL NOT BE INFLUENCED BY VAGUE RUMORS. (See Presumptions, 3.) 208.

JUSTICE OF THE PEACE.

SALARY OF JUSTICE OF THE PEACE. (See Salary Act, 1.) 92.

LAND.

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND—WHEN TIME IS NOT OF THE ESSENCE OF THE CONTRACT. (See Contract, 1, 2.) 94.

WHEN QUITCLAIM DEED CONVEYS GRANTOR'S TITLE ACQUIRED BY SUBSEQUENT PATENT. (See Deed, 1.) 229.

PAROL AGREEMENT TO CONVEY LAND. (See Evidence, 8.) 354.

LAND OFFICE.

CERTIFICATE OF REGISTER OF LAND OFFICE—EVIDENCE OF CONVEYANCE OF LAND. (See Evidence, 4.) 229.

LEGISLATURE.

POWER OF TO RESTRICT THE SALE OF OPIUM. (See Opium Act, 2.) 50.

PRESIDENT PRO TEM. OF THE SENATE IS NOT ENTITLED TO EXTRA PAY. (See Constitution, 4, 5.) 152.

LIEN.

SUFFICIENCY OF MECHANIC'S LIEN. (See Mechanics' Liens, 1–3.) 272.

COMMENCEMENT OF ACTION FOR LABOR LIENS—NOTICE. (See Sheriff, 2.) 404.

LIMITATIONS.

1. STATUTE OF LIMITATIONS—POSSESSION OF TENANT IN COMMON—WHEN ADVERSE—NOTICE.—To make the possession of one tenant in common adverse as against the others, it is not necessary that notice should be given of the adverse intent; but the intent must be manifested by outward acts of an unequivocal kind. *Abernathie* v. *Con. Virginia M. Co.*, 261.
2. IDEM—PLAINTIFF NOT TENANT IN COMMON.—The Sides company did not enter as tenant in common with plaintiff; but as owner of the entire claim. It never acknowledged plaintiff's title, but held under an avowed claim to the whole and in exclusion of plaintiff: *Held*, that its possession was adverse to plaintiff from its inception. *Id.*

LOTTERY.

ACT TO AID NEVADA BENEVOLENT ASSOCIATION (Stat. 1881, 161) PROVIDES FOR A LOTTERY AND IS UNCONSTITUTIONAL. (See Constitution, 3.) 136.

MANDAMUS.

1. JUDICIAL FUNCTIONS.—A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to determine a question of fact, the duty is judicial, and however erroneous its decision may be, it can not be compelled by mandamus to alter its determination. *Hoole* v. *Kinkead*, 218.

MARRIAGE.

1. MARRIAGE OF ADMINISTRATRIX OF AN ESTATE—EFFECT OF.—Defendant, prior to the trial, married J. V. Peers: *Held*, that this marriage extinguished her authority as administratrix of the estate, but did not deprive her of the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court. *Buckley* v. *Buckley*, 180.
2. IDEM—POSSESSION OF PERSONAL PROPERTY—PRESUMPTION.—At the time this action was commenced, defendant, as administratrix, had the right of possession to a band of sheep: *Held*, that her possession having been lawful while her authority as administratrix continued, the presumption is, nothing to the contrary appearing, that it continued lawful after her marriage, especially against a wrong-doer. *Id.*

MECHANICS' LIENS.

1. MECHANIC'S LIEN—ITEMS OF ACCOUNT.—It is not essential to the validity of a mechanic's lien to specify the items of the account. It is sufficient to set forth a statement of the demand showing its nature and character and the amount due or owing thereon. *Lonkey and Smith* v. *Wells*, 271.

2. IDEM—STATEMENT OF TERMS.—If there are no special terms, time, or conditions given in the contract, none need be stated in the lien. *Id.*

3. MECHANIC'S LIEN—WHEN MUST BE FILED.—A contractor must file his lien within sixty days after his contract is completed. Every other person entitled to a lien must file it within thirty days after the completion of the building. *Id.* 272.

4. IDEM—NOTICE TO LIEN CLAIMANTS.—The court proceeded to hear and determine the case without proof that notice had been given to other lien claimaints as provided by statute: *Held*, that, as there was no showing made that there were any other lien claimants, the defendant could not have been prejudiced, and is not entitled to a new trial. *Id.*

5. MECHANICS' LIENS—WHEN PROPERTY OWNER CAN NOT WITHHOLD MONEY DUE CONTRACTORS.—In construing the statutes relating to mechanics' liens: *Held*, that plaintiff was not authorized to withhold any part of the contract price, until the suits to enforce the liens were pending, and that it could not refuse to pay money according to the contract until the contractors were in default. *Carson Opera House* v. *Miller*, 328.

6. IDEM—LIABILITY OF SURETIES.—If plaintiff had paid the contractors according to their agreement it could have held the sureties, although when the payments were made, suits to enforce liens had been pending, or if at that time plaintiff had suffered damages by compulsory satisfaction of liens filed. *Id.*

7. IDEM—FAILURE TO MAKE PAYMENTS TO CONTRACTORS—RELEASE OF SURETIES.—The failure of plaintiff to pay the contractors according to the terms of the agreement, the contractors not then being in default, and the application of the money due the contractors to the satisfaction of liens filed before the completion of the contract, released the sureties upon the contractors' bond. *Id.*

BOND OF INDEMNITY TO KEEP PLAINTIFF HARMLESS AGAINST MECHANICS' LIENS. (See Bond, 1.) 327.

MINING CLAIMS.

1. COMPROMISE OF INTEREST IN MINING GROUND—AUTHORITY TO MAKE—ACQUIESCENCE IN.—Where a compromise is made between several persons as to the respective interests which each shall have in certain mining ground, W., one of said parties, being represented by G., and where all the parties to the compromise, including W., for a period of fifteen years, abided by its terms and acted upon it, and conveyed their interests in the ground in accordance therewith, and received the proceeds thereof: *Held*, that these circumstances, in connection with the fact that the defendant at the trial maintained the validity of the compromise which it alone, as the successor of W., could have attacked, rendered the question of G.'s authority to act for W. immaterial to the plaintiff's case. *Abernathie* v. *Con. Va. M. Co.*, 260.

2. IDEM—HOW INTERESTS OF PARTIES MAY BE DETERMINED—INSTRUCTION. The court instructed the jury: "To support the statement of any of the witnesses, you can consider the probability of his evidence and the facts to which he testifies, and any facts or circumstances detailed which might tend to corroborate or sustain the statement of any witness; and you may also take into consideration any description or calls in the deeds introduced in evidence, and the manner, conduct, and action of the original owners in relation to the ground, in determining the question whether or not the plaintiff and his associates each owned more than one hundred feet in the Sides claim," etc.: *Held*, upon the facts of this case, to be correct. *Id.*

3. IDEM—ASSESSMENT BOOK ADMISSIBLE IN EVIDENCE.—The Sides company was an unincorporated association. It had officers, kept a record of its meetings, and an assessment book which contained a list of all the owners of the Sides claim, with each of whom was kept an account showing the amount of assessment levied and the payments made. This book was, at all times, open to inspection, and no objection had ever been made thereto. The court instructed the jury that if they believed plaintiff had actual knowledge of its contents they could then consider the entries mentioned as admissions of the extent of his ownership: *Held*, that the instruction was correct. *Id.* 261.

4. MINING GROUND—DISCOVERY INTEREST—WHEN ONE PARTY IS ESTOPPED FROM DENYING THE INTEREST OF OTHERS.—G. joined with S. in claiming a discovery interest in a mining location, and afterwards recognized his claim to the mining ground, including the discovery interest, as being valid, and accepted from S., and his grantees, their proportionate share of the money expended for work and labor upon the entire claim. G. subsequently relocated the entire claim in his own name, claiming that the original location was void, because the locators were not the discoverers of the lode, and because S. was at the time of the location an alien. S. became a citizen before the relocation of the claim: *Held*, that G. was estopped by his conduct and acts from denying the rights claimed by S. and his grantees as owners in the claim. *Sever* v. *Gregovich*, 325.

TRANSFER OF CERTIFICATES OF MINING STOCK—WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING TITLE. (See Stock, 2, 3.) 185.

EFFECT OF PATENT TO SURFACE GROUND OF MINING CLAIM. (See Patent, 1.) 361.

MISTAKE.

MISTAKE IN ORIGINAL COMPLAINT UPON ACCOUNT STATED—WHO CAN TAKE ADVANTAGE OF. (See Pleadings, 7.) 388.

MOTION.

MOTION FOR NONSUIT—GROUNDS OF MUST BE STATED. (See Nonsuit, 2.) 229.

NEGLIGENCE.

1. NEGLIGENCE OF RAILROAD COMPANY—NEGATIVE AND POSITIVE TESTIMONY—CONFLICT OF EVIDENCE.—Upon the question whether defendant

rung its bell or blew its whistle there were several witnesses, upon the part of plaintiffs, who testified that they were in a position where they could have heard the signals had they been given, and that the signals were not given: *Held*, that this negative testimony raised a conflict of evidence against the affirmative testimony of defendant's witnesses, that the bell was rung and the whistle blown. *Bunting* v. *C. P. R. R. Co.*, 277.

2. CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—The court instructed the jury that if they believed from the evidence "that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same and to the passengers and railroad employees on same, in his then situation, and could prudently have avoided collision with his team, his failure so to stop amounts to negligence, and renders the defendant liable for damages, and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence:" *Held*, that, although this instruction is carelessly drawn, the principle of law embodied therein is not erroneous. (BELKNAP, J., dissenting.) *Id.*

3. IDEM—APPLICABILITY OF INSTRUCTION—JURY NOT MISLED.—Upon a review of the testimony and of the several instructions given by the court upon the question of negligence: *Held*, that there was some evidence to which the instruction might apply, and that the jury could not have been misled, by the giving of this instruction, to the prejudice of the defendant, as to the law of the case. (BELKNAP, J., dissenting.) *Id.* 278.

WHEN EQUITABLE RELIEF WILL NOT BE GRANTED IN CASE OF NEGLIGENCE. (See Equity, 1, 2.) 25.

DUTY OF RAILROAD COMPANY TO STOP ITS TRAIN IN CASE OF GREAT PERIL. (See Railroads, 1.) 278.

NEVADA BENEVOLENT ASSOCIATION.

ACT TO AID NEVADA BENEVOLENT ASSOCIATION (STAT. 1881, 161) PROVIDES FOR A LOTTERY AND IS UNCONSTITUTIONAL. (See Constitution, 3.) 136.

NEVADA ORPHAN ASYLUM.

1. SECTARIAN INSTITUTION.—The Nevada Orphan Asylum of Virginia City is a sectarian institution, and as such is prohibited by the Constitution from drawing any money from the State treasury to be used for sectarian purposes. *State ex rel. Nevada Orphan Asylum* v. *Hallock*, 373.

NEW TRIAL.

1. NEWLY DISCOVERED EVIDENCE—MATERIALITY OF—AUTHORITY OF AGENT. On the trial plaintiffs testified that they sold a quantity of hay to one Dwelly as the agent of defendants. Defendants testified that the hay was sold to Dwelly as the agent of a corporation. Plaintiffs recovered judgment, and the court granted a new trial upon the ground of newly discovered evidence: *Held*, that admissions made by plaintiffs, before and after the trial, that they sold the hay to Dwelly as agent for the

corporation, was material, regardless of the question whether Dwelly had the authority to make the purchase. *Wall* v. *Trainor*, 131.

2. IDEM—WHEN TESTIMONY IS NOT CUMULATIVE.—Testimony is only cumulative which is in addition to, or corroborative of, what was given at the trial. If the newly discovered evidence brings to light some new fact bearing upon the main question at issue between the parties, and it would be likely to change the result, a new trial should be granted. *Id.*
3. RECORDS OF COURT—STATEMENT—TRIAL AND APPELLATE COURT.—The records of the court may be acted upon in the trial court on a motion for a new trial without being inserted in the statement; but, where there is no statement on appeal, the records of the lower court must be designated by the judge as having been read, or referred to, on the hearing, or put in the statement, or they will not be considered by the appellate court. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 156.
4. FINDING OR DECISION OF COURT AGAINST LAW—PLEADINGS.—If the decision or finding of a court or referee is against law, a new trial is the proper remedy; the decision is against law if it is contrary to, or inconsistent with, the case made and embraced within the issue. *Id.* 157.
5. NEW TRIAL—CONFLICTING AFFIDAVITS—MISCONDUCT OF JURORS.—In the case of a conflict in the affidavits on motion for a new trial on the ground of misconduct of jurors: *Held*, that it was the duty of the district court to determine the question of veracity, and that its action in this respect will not, upon the showing made, be disturbed. *State* v. *St. Clair*, 207.

WHEN STATEMENT ON MOTION FOR A NEW TRIAL IS NOT A STATEMENT ON APPEAL. (See Statement, 1.) 39.

STATEMENT ON MOTION FOR A NEW TRIAL—WHEN MAY BE SETTLED BY THE JUDGE INSTEAD OF REFEREE. (See Statement, 5.) 156.

ORDER AMENDING RECORDS CONCERNING TIME IN WHICH TO FILE AND SERVE STATEMENT ON MOTION FOR NEW TRIAL IS APPEALABLE. (See Appeal, 2.) 156.

ORDER REFUSING TO DISMISS APPLICATION FOR NEW TRIAL IS APPEALABLE. (See Appeal, 2.) 156.

NONSUIT.

1. NONSUIT—WHEN IT SHOULD NOT BE GRANTED.—If there is any evidence which would authorize a recovery of any portion of the land in controversy a nonsuit should not be granted. *Brown* v. *Warren*, 229.
2. MOTION FOR NONSUIT—GROUNDS OF MUST BE STATED—WAIVER.—It was urged upon appeal that a nonsuit should have been granted, because there was no proof of the due execution of the conveyance to plaintiff. No such ground was stated in the motion for a nonsuit: *Held*, that by failing to specify this ground at the time the motion was made, defendants waived it, and that it could not be considered on appeal. *Id.*

JUDGMENT OF NONSUIT—SUFFICIENCY OF SPECIFICATION OF ERROR IN STATEMENT ON APPEAL. (See Statement, 6.) 228.

WHEN QUITCLAIM DEED CONVEYS GRANTOR'S TITLE ACQUIRED BY SUBSEQUENT PATENT. (See Deed, 1.) 229.

PATENT TO MINING CLAIM—WHEN NONSUIT SHOULD NOT BE GRANTED. (See Patent, 1.) 361.

NOTICE.

WHEN NOTICE OF ADVERSE POSSESSION NEED NOT BE GIVEN TO MAKE POSSESSION OF TENANT IN COMMON ADVERSE. (See Limitation, 1, 2.) 261.

NOTICE TO LIEN CLAIMANTS. (See Mechanics' Liens, 4.) 272.

NOTICE OF APPLICATION FOR COUNSEL FEES IN ACTION FOR DIVORCE MUST BE SERVED UPON ATTORNEY. (See Divorce, 1.) 363.

NOTICE OF COMMENCEMENT OF ACTION ON LABOR LIENS. (See Sheriff, 2.) 404.

OBJECTIONS.

OBJECTIONS NOT RAISED IN THE COURT BELOW WILL NOT BE CONSIDERED ON APPEAL. (See Sureties, 4.) 427.

OFFICE AND OFFICER.

1. ACCEPTANCE OF AN OFFICE—NOT A CONTRACT.—No contract is created between the government and the officer by his acceptance of the office. *State ex rel. Scott* v. *Trousdale*, 357.

PRESIDENT PRO TEM. OF THE SENATE IS NOT ENTITLED TO EXTRA PAY. (See Constitution, 4, 5.) 152.

ELECTION OF OFFICERS OF CORPORATION—WHO ARE STOCKHOLDERS. (See Corporation, 1, 2.) 242.

DUTIES OF STATE CONTROLLER. (See State Controller, 1.) 373.

"ACT RELATING TO SHERIFFS" (STAT. 1861, 104)—LIABILITY OF SHERIFF AND HIS SURETIES FOR WRONGFUL WITHHOLDING OF MONEY. (See Sheriff, 4–7.) 405.

OFFICIAL BOND.

SURETY ON OFFICIAL BOND CAN NOT RECOVER FULL DAMAGES FROM CO-SURETIES. (See Sureties, 1.) 298.

OPIUM ACT.

1. CONSTITUTIONALITY OF.—Section 1 of the Opium Act (Stat. 1877, 69) does not conflict with any of the provisions of the constitution of this State. *State* v. *Ah Chew*, 50; *State* v. *Ah Gonn*, 61; *State* v. *Ching Gang*, 62.
2. IDEM—RESTRICTION UPON SALES OF OPIUM.—Under the police power and in the interest of good morals, the good order and peace of society, for the prevention of crime, misery, and want, the legislature has authority to place such restrictions upon the sale or disposal of opium as will mitigate, if not suppress, its evils to society. *Id.*
3. SALE BY PHYSICIANS.—To make a defense for the sale of opium by a practicing physician complete, the defendant must show that he comes within the provisions of the "act to prevent the practice of medicine and surgery by unqualified persons" (Stat. 1875, 47). *State* v. *Ching Gang*, 62.

ORDER.

ORDER AMENDING RECORDS CONCERNING TIME IN WHICH TO FILE AND SERVE STATEMENT ON MOTION FOR NEW TRIAL IS APPEALABLE. (See Appeal, 2.) 156.

ORDER REFUSING TO DISMISS APPLICATION FOR NEW TRIAL IS APPEALABLE. (See Appeal, 2.) 156.

ORDER AMENDING RECORDS AS TO TIME GIVEN FOR FILING STATEMENT—WHEN MAY BE MADE. (See Amendments, 1.) 156.

PAROL EVIDENCE.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW IDENTITY OF LAND WITH DESCRIPTION IN DEED. (See Deed, 2.) 229.

PAROL AGREEMENT TO CONVEY LAND. (See Evidence, 8.) 354.

PARTIES.

RIGHTS OF PARTIES WHO HAVE NOT APPEALED WILL NOT BE CONSIDERED. (See Appeal, 1.) 40.

PARTIES TO SUIT—WHEN ERROR IS UNPREJUDICIAL. (See Error, 1.) 180.

DEMURRER FOR NON-JOINDER OF PARTIES—WHEN WAIVED. (See Pleadings, 5.) 271

PARTNERSHIP.

ACTION BY SURVIVING PARTNER ON PROMISSORY NOTE EXECUTED IN FIRM NAME AFTER DEATH OF A PARTNER—SUFFICIENCY OF COMPLAINT. (See Pleadings, 1.) 85.

PATENT.

1. EJECTMENT—PATENT TO SURFACE GROUND OF MINING CLAIM—WHEN NONSUIT SHOULD NOT BE GRANTED.—Plaintiff claimed title to a town lot under a patent issued for a mining claim embracing the land in controversy. The court granted a nonsuit upon the ground that it had not been alleged or proven that plaintiff required said land or had any use for the same in the working of the mining claim: *Held*, that the patent made out a *prima facie* case for the plaintiff, and that the court erred in granting a nonsuit. *Abbott* v. *Primeaux*, 361.

WHEN QUITCLAIM DEED CONVEYS GRANTOR'S TITLE ACQUIRED BY SUBSEQUENT PATENT. (See Deed, 1.) 229.

PAYMENT.

FAILURE TO MAKE PAYMENTS—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND—WHEN TIME IS NOT OF THE ESSENCE OF THE CONTRACT. (See Contract, 1, 2.) 94.

WHEN PROPERTY OWNER CAN NOT WITHHOLD MONEY DUE CONTRACTOR—LIABILITY OF SURETIES. (See Mechanics' Liens, 5, 6.) 328.

PAYMENT OF MONEY TO SHERIFF AFTER RETURN-DAY OF EXECUTION. (See Sheriff, 6.) 405.

PENALTY.

ACT RELATING TO SHERIFFS (STAT. 1861, 104)—LIABILITY OF SHERIFF AND HIS SURETIES FOR PENALTIES IN WRONGFUL WITHHOLDING OF MONEY. (See Sheriff, 4–7.) 405.

ACT PRESCRIBING ADDITIONAL PENALTY IN TAX SUITS IS CONSTITUTIONAL. (See Constitution, 14.) 432.

PERFORMANCE OF CONTRACT.

See SPECIFIC PERFORMANCE.

PERSONAL PROPERTY.

POSSESSION OF PERSONAL PROPERTY BY ADMINISTRATRIX—PRESUMPTIONS AFTER MARRIAGE. (See Marriage, 2.) 180.

PROPERTY EXEMPT FROM EXECUTION BY TEAMSTER—SELECTION OF PROPERTY. (See Execution, 1, 2.) 416.

PHYSICIANS.

SALE OF OPIUM BY PHYSICIANS. (See Opium Act, 3.) 62.

PLEADINGS.

1. ACTION BY SURVIVING PARTNER ON PROMISSORY NOTE EXECUTED IN FIRM NAME AFTER DEATH OF A PARTNER—SUFFICIENCY OF COMPLAINT.—The allegations of complaint stated in the opinion and held equivalent to a positive averment that the note was made and delivered to the plaintiff, as surviving partner, in the name of the firm, and to be sufficient to enable plaintiff to maintain the action. *Manning* v. *Smith*, 85.
2. ACTION AGAINST TRUSTEES OF CORPORATION—SUFFICIENCY OF COMPLAINT—DEMURRER.—Upon a review of the pleadings in an action against the trustees of a corporation for levying unnecessary assessments with intent to defraud the stockholders, and to have the assessments declared null and void, and for other relief: *Held*, that the demurrer to the complaint was properly overruled; that the complaint stated a cause of action against the personal defendants; and that the corporation was a proper party defendant. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 157.
3. FINDINGS NOT SUPPORTED BY THE PLEADINGS—LEVY OF ASSESSMENTS AND SALE OF STOCK AFTER COMPLAINT IS FILED.—When the complaint was filed, the sale of stock under the thirteenth assessment had not been made and the fourteenth assessment had not been levied. The referee found that these assessments would have been unnecessary if the trustees had faithfully administered the business of the corporation and faithfully used the funds realized by the twelve assessments previously levied, and that since the commencement of the suit the trustees had caused the stock of plaintiffs and intervenor to be sold on the thirteenth and fourteenth assessments. As conclusion of law the referee found that these two assessments were unnecessary; that they were made to defraud the stockholders; that they were fraudulent and void; and that plaintiffs were entitled to have them so declared, and to have the sales made thereunder set aside, etc.: *Held*, that the decision of the referee was not justified by the pleadings, and consequently that it was against law. *Id.*
4. AMENDMENT OF COMPLAINT AFTER FINDINGS ARE MADE—WHEN NOT ALLOWABLE.—When it is not affirmatively shown that the defendants

had reason to believe that the affairs of the corporation, subsequent to the commencement of the action, would be inquired into with the view of arriving at a judicial settlement of the same, or that the case was tried upon that theory: *Held*, that the court, after the findings were made, properly denied plaintiff's application to amend their complaint so that it should conform to the findings of the referee. *Id.*

5. DEMURRER FOR NON-JOINDER OF PARTIES, ETC.—HOW WAIVED.—A party interposing a demurrer and relying upon any defect in the complaint as to non-joinder of parties, or uncertainty, must let final judgment be entered upon his demurrer. If he answers after his demurrer is overruled, he waives his right to rely upon his demurrer. *Lonkey and Smith* v. *Wells*, 271.

6. AMENDMENT OF COMPLAINT—BETWEEN PARTIES.—As between the plaintiff and the defendant, plaintiff had the right to amend his complaint by adding a count for goods sold and delivered, and money advanced by him to defendant, which included the same items that were embraced in the original complaint upon an "account stated." *Mendes* v. *Freiters*, 388.

7. MISTAKE IN ORIGINAL COMPLAINT—WHO CAN TAKE ADVANTAGE OF.—If the plaintiff made a mistake in declaring upon an "account stated" instead of for goods sold and delivered, etc., the defendant is the only one that could have taken advantage of the error. *Id.*

8. AMENDMENT—EFFECT OF UPON ATTACHMENT—DEFENDANT.—Defendant could not demand a release of the property attached because of the amendment. As to him, plaintiff's lien was in force after as well as before the amendment. *Id.*

9. IDEM—INTERVENORS.—An amendment changing the form of action merely, or adding a new count for the same, will not dissolve the attachment as to intervenors. *Id.*

DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE—WHEN RIGHTS ARE WAIVED BY FILING A DEMURRER AND ANSWER. (See Waiver, 1.) 64.

RIGHTS OF INTERVENOR—ANSWER—RELIEF GRANTED. (See Intervenor, 1, 2.) 156.

JUDGMENT MUST CONFORM TO THE ISSUES MADE BY THE PLEADINGS. (See Judgment, 1.) 156.

DECISION OF COURT IS AGAINST LAW IF IT IS INCONSISTENT WITH THE ISSUES MADE BY THE PLEADINGS. (See New Trial, 4.) 157.

ACTION ON MECHANICS' LIENS—ITEMS OF ACCOUNT—STATEMENT OF TERMS. (See Mechanics' Liens, 1, 2.) 271.

SURETY ON OFFICIAL BOND CAN NOT RECOVER FULL DAMAGES FROM CO-SURETIES—DEFENSE TO SUIT. (See Sureties, 1, 2.) 298.

POSSESSION.

RIGHT OF POSSESSION IS NOT INVOLVED IN ACTION OF FORCIBLE ENTRY AND UNLAWFUL DETAINER. (See Forcible Entry, 1.) 154.

POSSESSION OF PERSONAL PROPERTY BY ADMINISTRATRIX—PRESUMPTION. (See Marriage, 2.) 180.

WHEN POSSESSION OF TENANT IN COMMON IS ADVERSE WITHOUT NOTICE. (See Limitation, 1, 2.) 261.

PRACTICE ACT.

Section 68. Judgments—How set aside, 373.
Section 194. New trials—When granted, 373.
Section 197. Statement on motion for new trial, 49, 69, 70.
Section 332. Specification of errors, 231.
Section 333. Waiver of statement, 69.
Section 491. When notice must be in writing, 71.

See STATUTES—PROVISIONS OF COMPILED LAWS, CITED.

PRESUMPTIONS.

1. PRESUMPTIONS IN FAVOR OF JUDGMENT.—When nothing is shown to the contrary, this court will presume that the judgment is sustained by the findings, and that the findings were justified by the evidence. *Nesbitt* v. *Chisholm*, 39.

2. PRESUMPTIONS—REGULARITY OF PROCEEDINGS.—In the absence of evidence to the contrary, every presumption is in favor of the regularity of the proceedings in the court below. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 156.

3. PRESUMPTIONS—CONDUCT OF JURORS—VAGUE RUMORS.—The presumption is that every juror is a man of ordinary intelligence, and that he acts conscientiously in the performance of his sworn duty, and that he would not be improperly influenced by vague rumors. *State* v. *St. Clair*, 208.

4. PRESUMPTIONS—WHERE RECORD DOES NOT CONTAIN ALL THE EVIDENCE. Where the record on appeal does not purport to contain all of the evidence, this court will presume that there was evidence sufficient to sustain the conclusions and judgment of the court. *Lonkey and Smith* v. *Wells*, 271.

5. FINDINGS OF JURY UPON SPECIAL ISSUES—PRESUMPTIONS.—Where an equitable defense is raised and a jury is called "to aid the court in its findings of fact" upon certain special issues stated: *Held*, that it will be inferred that all other questions of fact were reserved for the consideration of the court without the aid of the jury. *Treadway* v. *Wilder*, 354.

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RAILROADS.

1. REASONABLE CARE—DUTY OF RAILROAD COMPANY TO STOP ITS TRAIN IN CASE OF GREAT PERIL.—Railroad companies, as well as travelers, must exercise reasonable care and caution; and in the present case, although the plaintiffs may not have been entirely free from fault, if the engineer of defendant's train saw the plaintiffs' team, as it was coming upon the track, in a position of great peril and danger, and he could, by the exercise of reasonable care, have lessened the speed of his train, or stopped it, with safety, in time to have avoided the collision, it was his duty to do so. *Bunting* v. *C. P. R. R. Co.*, 278.

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1. DEPOSITION.—The taking of a recognizance is not a condition precedent to the admission of a deposition in a criminal case. *State* v. *Parker*, 79.

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RULES OF COURT MUST BE EMBODIED IN STATEMENT. (See Statement, 4.) 156.

SALARY ACT.

1. SECTION 17 OF SALARY ACT (STAT. 1879, 136) CONSTRUED—SALARY OF JUSTICE OF THE PEACE.—*Held*, that under section 17 of the salary act the right of every justice of the peace, elected or appointed after the act took effect, to salary or fees, should be determined by reference to the number of legal votes cast at the last general election preceding the time when the claim for his salary is preferred. *State ex rel. Flanningham* v. *Commissioners*, 92.

2. LONG-TERM COUNTY COMMISSIONERS—SALARY OF REGULATED BY SALARY ACT.—The compensation of county commissioners is regulated by the provisions of the salary act. (Stat. 1879, 133.) *State ex rel. Scott* v. *Trousdale*, 357.

3. IDEM—MILEAGE.—The provision allowing mileage in the former law was intended as a part of the compensation of commissioners for their services. The language of the salary act that the salaries fixed "shall be in full for all services," excludes the idea that the legislature intended to allow the former provision upon that subject to stand. *Id.*

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SALE OF STOCKS—WHEN NOT VOID. (See Stock, 1.) 157.

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SHERIFF.

1. TRANSFER OF BIDS—EXECUTION SALE—MONEY RECEIVED BY SHERIFF IN HIS OFFICIAL CAPACITY.—N. and K., as judgment creditors, purchased at sheriff's sale under execution certain cord-wood. No money was paid, each creditor intending that his bid should be credited upon his execution. The sheriff demanded money for his fees, and also for the purpose of paying preferred labor liens upon the property. The creditors, at his suggestion, disposed of their interests to M., and M. thereafter paid the money to the sheriff, who neglected and refused to pay the same, or any part thereof, to the judgment creditors. Evidence relating to this transaction reviewed: *Held*, that the disposal of the interests of the judgment creditors to M. was a transfer of the bids, instead of a sale of the property, and that the sheriff received the money in his official capacity. *Nash* v. *Muldoon*, 404.
2. LABOR LIENS—COMMENCEMENT OF ACTION—NOTICE.—The sheriff is not justified in paying labor liens before the commencement of an action to enforce them, after notice that the liens are disputed, or when the parties in interest had no notice of the claim of the laborers. *Id.*
3. SHERIFF'S EXPENSES IN TAKING CHARGE OF PERSONAL PROPERTY—CERTIFICATE OF DISTRICT JUDGE.—The sheriff is not authorized to withhold money for his expenses incurred in preserving personal property, levied

upon, unless his charges have been certified to by the district judge as just and reasonable. *Id.*

4. REFUSAL OF SHERIFF TO PAY MONEY—SECTION 10 OF "ACT RELATING TO SHERIFFS" (STAT. 1861, 104) CONSTRUED—PENALTIES.—The penalties imposed by section 10 of the "act relating to sheriffs" was intended as a punishment for intentional wrong-doing, and are not to be enforced in cases of mistakes, or errors of judgment, made by the officer in good faith. *Id.* 405.
5. IDEM—LIABILITY OF SHERIFF AND HIS SURETIES.—The sheriff and his sureties are liable for all moneys received by him in his official capacity, which he neglects or refuses to pay over, on demand, and for the penalalties imposed by the statute when he does not act in good faith. *Id.*
6. IDEM—PAYMENT OF MONEY AFTER RETURN DAY OF EXECUTION.—The sheriff and his sureties are liable for all moneys collected by him from the sale of property levied upon before the return day of the writ of execution, notwithstanding intermediate the levy and sale, or payment of the money, the writ may have become *functus officio*. *Id.*
7. IDEM—RETURN TO WRIT—NOT NECESSARY TO AUTHORIZE PROCEEDINGS UNDER THE STATUTE.—The return of the sheriff admitting the receipt of the money is not a condition precedent to the institution of proceedings under the provisions of the statute. The receipt of the money may be established by other evidence. *Id.*

SPECIAL LAW.

THE "ACT TO DISCONTINUE LITIGATION" IN CERTAIN TAX SUITS IS A SPECIAL LAW, AND IS UNCONSTITUTIONAL. (See Constitution, 14.) 432.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND—FAILURE TO MAKE PAYMENTS—WHEN TIME IS NOT OF THE ESSENCE OF THE CONTRACT. (See Contract, 1, 2.) 94.

STATE CONTROLLER.

1. STATE CONTROLLER—DUTIES OF.—It is the duty of the state controller to refuse to draw his warrant for any money that is to be used for unconstitutional purposes. *State ex rel. Nevada Orphan Asylum* v. *Hallock*, 373.

STATEMENT.

1. STATEMENT ON MOTION FOR NEW TRIAL—WHEN NOT STATEMENT ON APPEAL.—When an appeal is taken from the judgment alone, the statement on motion for a new trial will not be considered as a statement on appeal, unless there is a stipulation to that effect. *Nesbitt* v. *Chisholm*, 39.
2. STATEMENT ON MOTION FOR NEW TRIAL—AUTHENTICATION OF.—A certificate of the clerk to the effect that no amendments to the statement have been filed, is such an authentication as is required by section 197 of the civil practice act. *Borden* v. *Bender*, 49.

3. STATEMENT ON APPEAL—WHEN NOT CONSIDERED.—Where it is not shown that the statement on appeal was filed with the clerk, or that a copy of it was served, or that it was agreed to, or settled by the judge: *Held*, that it did not comply with any of the requirements of the statute and could not be considered. *Baum* v. *Meyer*, 91.

4. RULES OF COURT MUST BE EMBODIED IN STATEMENT.—A rule of the district court relative to the settlement of a statement on motion for a new trial will not be considered by this court unless it is embodied in the statement. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 156.

5. STATEMENT ON MOTION FOR NEW TRIAL—SETTLEMENT OF BY JUDGE OR REFEREE—PRACTICE.—In a case tried before a referee, where all the proceedings are reported to the court, the statement on motion for a new trial may be settled by the judge. *Id.*

6. JUDGMENT OF NONSUIT—STATEMENT ON APPEAL—SPECIFICATION OF ERROR.—On appeal from a judgment of nonsuit the specification of error is in these words: "To this decision and judgment of the court the plaintiff by his attorney, then and there duly excepted, and assigns the decision and judgment of nonsuit as error:" *Held*, sufficient. *Brown* v. *Warren*, 228.

ORDER AMENDING RECORDS CONCERNING TIME IN WHICH TO FILE AND SERVE STATEMENT ON MOTION FOR NEW TRIAL IS APPEALABLE. (See Appeal, 2.) 156.

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STATE PRISON.

STATE PRISON ACT (STAT. 1881, 109) CONSTRUED—COMMUTATION OF PRISONER'S SENTENCE. (See Constitution, 2.) 98.

STATUTES.

1. STATUTE TO EMBRACE BUT ONE SUBJECT—STATUTE 1881, 59, CONSTRUED—CARE OF INSANE.—The "act to provide for the taking care of the insane of Nevada" provides for the construction of an asylum; that the money appropriated for that purpose shall be taken from the state school fund, and in its place there shall be deposited state bonds, bearing interest, etc., and provides for the levy and collection of a tax to meet the payment of said bonds: *Held*, that the act embraces but one subject, the care of the insane, which is fairly expressed in its title. *Klein* v. *Kinkead*, 194.

2. IDEM.—The different steps by which the result is to be accomplished are not different subjects, but minor parts of the same general subject. *Id.*

3. LOWEST RESPONSIBLE BIDDER—STAT. 1881, 59, CONSTRUED.—In providing for the erection of an insane asylum, the statute declared that the board of commissioners might adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken: *Held*, that the provision for the lowest responsible bid is mandatory; but in ascertaining whether

or not a bidder was responsible, the board was required to deliberate and decide, and in doing so they exercised judicial functions. *Hoole* v. *Kinkead*, 217.

STATUTORY OFFENSE—WHEN NEGATIVE EXCEPTIONS NEED NOT BE STATED IN INDICTMENT. (See Indictment, 1, 2.) 50.

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See LIMITATIONS.

STOCK.

1. SALE OF STOCK—WHEN NOT VOID.—If at the time the thirteenth and fourteenth assessments were levied the corporation had no funds, and these assessments were needed for legitimate purposes, the sales made thereunder would not be void for the reason that the trustees had previously misappropriated the funds of the corporation. *Marshall* v. *Golden Fleece G. & S. M. Co.*, 157.
2. TRANSFER OF CERTIFICATES OF MINING STOCK—WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING TITLE.—G. deposited with the Bank of Virginia certain certificates of mining stock which were issued, in the usual form, in the name of different parties, and indorsed by them, as trustees, to be held as collateral security for any indebtedness that then existed, or might thereafter be incurred, by reason of any purchase or sale of stock that the bank might make for G. Subsequently the bank, without the knowledge or authority of G., delivered these certificates of stock, with others, to H. as collateral security for the payment of a loan made by him to the bank and for any further advances that might be made. H. had no knowledge that G. was the owner of the stock: *Held*, that G. could not recover the value of these certificates of stock against H., who received the same in good faith, believing them to be the property of the bank. *Gass* v. *Hampton*, 185.
3. IDEM—INDICIA OF OWNERSHIP.—A party who places another in a position to enable him to commit a fraud, should suffer the loss rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him. *Id.*

LEVY OF ASSESSMENT AND SALE OF STOCKS AFTER COMPLAINT IS FILED—WHEN FINDINGS ARE NOT SUPPORTED BY THE PLEADINGS. (See Pleadings, 3.) 157.

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SUPREME COURT HAS NO JURISDICTION ON APPEAL FROM A JUDGMENT IN A CRIMINAL CASE FOR ASSAULT. (See Jurisdiction, 1.) 89.

WHEN ALLOWANCE OF COUNSEL FEES, IN AN ACTION FOR DIVORCE, WILL BE GRANTED BY THE SUPREME COURT. (See Divorce, 5.) 364.

SURETIES.

1. SURETY ON OFFICIAL BOND CAN NOT RECOVER FULL DAMAGES FROM CO-SURETIES.—A surety upon an official bond, that is joint and several in

form, can not recover from his co-sureties the full amount of damages he may have sustained by the wrongs of their common principal. *Alderson* v. *Mendes*, 298.

2. IDEM—DEFENSE TO SUIT—CIRCUITY OF ACTION.—In a case where one can recover against another, and the latter can turn around and recover the money back, the law, by way of rebuttal, and to avoid circuity of action, holds such liability a defense to the first action. *Id.*

3. REPLEVIN BOND—COMPROMISE WITH PORTION OF SURETIES—ACTION AGAINST OTHERS.—Plaintiff compromised with four sureties, for less than their liability, and deducted from the amount of his damages the amount paid by them: *Held*, that the remainder is recoverable from one of the other sureties to the extent of his liability. *Cain* v. *Williams*, 426.

4. IDEM—EFFECT OF RELEASE OF SURETIES NOT RAISED IN COURT BELOW. *Held*, that the question whether the release of the four sureties operated as a release of the defendant, could not be considered, because not raised in the court below. *Id.* 427.

FAILURE OF PROPERTY OWNER TO MAKE PAYMENTS, AS SPECIFIED IN THE CONTRACT, TO THE CONTRACTOR, RELEASES THE SURETIES. (See Mechanics' Liens, 5–7.) 328.

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TELEGRAPH.

1. TELEGRAPH MESSAGES—DUTY OF COMPANY.—It is the duty of telegraph companies to transmit messages with reasonable diligence, and in the order of time in which they are received. *Mackay* v. *Western Union T. Co.*, 222.

2. IDEM—DAMAGES FOR DELAY.—Unless the importance of the message is shown either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose. *Id.*

3. IDEM.—Telegraph companies are liable to the extent of the actual damage sustained for delay or failure in transmitting a dispatch, the importance of which is manifest either by its own words or made so by explanation. *Id.*

TENANT IN COMMON.

ONE TENANT IN COMMON MAY MAINTAIN EJECTMENT AGAINST EVERY ONE BUT A CO-TENANT. (See Ejectment, 1.) 229.

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WAIVER.

1. DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE—WHEN RIGHTS ARE WAIVED BY FILING A DEMURRER AND ANSWER.—Plaintiff, in an action to determine the question of the right of possession to certain mining ground for which the defendant had applied for a patent, failed to prosecute its suit with reasonable diligence, by delay in serving the summons. Defendant made no motion to dismiss the case until after service of summons, and after it had appeared in the action, by attorneys, and filed a demurrer and an answer to plaintiff's complaint: *Held*, that, by raising the issues of law and fact, the defendant waived its right to move for a dismissal of the action upon the ground that the summons had not been served within a reasonable time. *Iowa M. Co.* v. *Bonanza M. Co.*, 64.
2. IDEM—WAIVER OF THE WAIVER TO DISMISS.—When defendant moved to dismiss the case, the plaintiff consented to a hearing of the motion upon its merits: *Held*, that plaintiff by not moving to dismiss the defendant's motion, waived the irregularities and waiver of defendant. *Id.*

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WATER RIGHTS.

1. ACTION FOR DIVERSION OF WATER—VINDICATION AND PRESERVATION OF A RIGHT—ADVERSE RIGHT.—Where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time, would ripen into an adverse right, and deprive the plaintiff of his property, he is not only entitled to an action for the vindication of his right, but also for its preservation. *Brown* v. *Ashley*, 312.
2. IDEM—WHEN INJUNCTION SHOULD ISSUE—NOMINAL DAMAGES—PRESENT USE OF WATER.—In actions for the diversion of water, where there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary to show actual damages, or a present use of the water, in order to authorize a court to issue an injunction and make it perpetual. *Id.*
3. PRIOR APPROPRIATION OF WATER.—Prior appropriation gives the better right to running waters upon the public lands, to the extent of the appropriation. *Strait* v. *Brown*, 317.
4. DISTINCTION BETWEEN RUNNING WATER AND WATER PERCOLATING THROUGH THE SOIL.—Percolating water existing in the earth is not governed by the same laws that pertain to running streams. No distinction exists between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions. *Id.*

5. IDEM—FACTS—LAW OF PERCOLATING WATERS NOT APPLICABLE.—The waters of "Warm Springs," at one time, flowed through a natural surface channel to Duckwater creek. The calcareous properties of the waters of the springs have formed a light, porous limestone by which the natural channel from the slough (near the springs) to the creek has been closed, and by some subterranean means, which are not satisfactorily established, the waters find their way to the creek. The springs are the source of the creek, and the diversion of the water from the springs, by the defendants, appreciably diminished the volume of water naturally flowing in the creek: *Held*, upon the facts, that the law of percolating waters was not applicable, and that the law of appropriation must govern the case. *Id.* 318.

6. IDEM—SUBTERRANEAN STREAMS.—Later appropriators can not lawfully acquire rights to the waters of the springs which constitute the source of the creek, simply because the means by which the waters are conveyed from the springs to the creek are subterranean and not well understood. *Id.*

WITNESS.

CREDIBILITY OF DEFENDANT'S TESTIMONY IN A CRIMINAL CASE. (See Criminal Law, 1, 2.) 36.

DEPOSITION OF WITNESS UNDER SECTION 151 OF THE CRIMINAL PRACTICE ACT—WITNESS OUT OF STATE. (See Criminal Law, 9.) 79.

CREDIBILITY OF WITNESSES. (See Instructions, 5.) 307.

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